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No.

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IN THE

Supreme Court of the United States

October Term 1998

MICHAEL MISZKO, JR.,

Petitioner,

-v.-

ATTORNEY GENERAL OF THE STATE OF NEW YORK; NEW YORK STATE POLICE; JAMES W. McMAHON, Superintendent of the New York State Police; THOMAS A. CONSTANTINE, former Superintendent of the New York State Police; NEW YORK STATE POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM; H. CARL McCALL, Comptroller; EDWARD V. REGAN, former Comptroller,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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(1011 – 1998)

2494P

QUESTIONS PRESENTED

1. Whether Petitioner is barred by the statute of limitations if he timely proceeded to exhaust all his administrative remedies for accidental disability retirement benefits pursuant to §§363, 363-b and 363-c, of the New York State Retirement and Social Security Law (RSSL) and timely filed the Complaint in this action subsequent to his latter §363-c RSSL claim.

2. Whether Petitioner is barred by any theory of preclusion if he filed an involuntary transfer grievance with his employer and was subsequently involuntarily retired for disability reasons by his employer without completion of the grievance process according to policy and contractual collective bargaining agreement in effect at the time.

3. Whether Petitioner is barred from filing the instant action subsequent to timely filing a complaint with the Equal Employment Opportunity Commission (EEOC)and receipt of Notice of Right To Sue but during his appeals for fact-finding and Substantive Weight Review processes.

4. If Petitioner's lawsuit is not barred by the statute of limitations, whether the Courts below erred by dismissing all his claims and denying leave to amend the Complaint.

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is explained as follows:

The original Complaint in this action was filed on February 16, 1995 with the parties, at that time, listed in the caption of the case on the cover page. An Amended Verified Complaint dated March of 1966 added the State of New York and the following New York State and Local Retirement System members in their individual and official capacities:

1. JOHN McMANAMAN, Assistant Deputy Comptroller.

2. JAY FREMONT, Director, Retirement Benefits.

The following member of The State Insurance Fund, carrier for the New York State Workers' Compensation system, was also added:

1. MARGARET PECORONI, Sr. Compensations Claims Examiner.

As to unnamed co-conspirators, Petitioner reserves the right to include additional defendants/respondents who in carrying out their conspiratorial plan to retaliate against Petitioner, a number of persons other than the named individual respondents were upon information and belief active participants. At such time as the specific conduct of those persons is ascertained in connection with pre-trial discovery in this action, which has not been accomplished as of this date, appropriate judicial recourse will be taken with respect to them; also in their individual and official capacities.

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APPENDIX G Cover letter from John McManaman, Assistant Deputy Comptroller, New York State and Local Retirement Systems, dated August 24, 1994, with attached Application for Policemen's and Firemen's Retirement for Disability Incurred in Performance of Duty, dated May 29, 1991, and Findings of Fact and Conclusions of Law, dated July 21, 1994.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit of New York appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court for the Southern District of New York appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was September 21, 1998.

No petition for rehearing was filed in Petitioner's case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE

Petitioner first became employed as a Police Officer for the City of Kingston, N.Y. on June 26, 1968. He simultaneously commenced his Tier 1 membership with the State Retirement System on that same date. (Appendix E, pages 203a-1 [now E-11], 248a [now E-16].)

On September 11, 1969, petitioner was appointed a Corrections Officer with the New York State Department of Corrections. He retained his Tier 1 status as a member of said Retirement System.

On September 6, 1973, petitioner was appointed a Trooper with the Division of New York State Police, retaining all his Tier 1 membership rights, benefits and privileges, with the same retirement system, as permitted by New York State laws.

Petitioner had pursuant to Article V, §7, of the New York State Constitution (Appendix H.), Article I, §10, ¶1, U.S. Const. (Appendix I.), a valid contractual relationship with the System that continued up to his date of retirement on February 15, 1990 that should not have been diminished or impaired. This contract entitled Miszko to an accidental disability benefit of 75% of his final average salary upon being retired due to accidental disability pursuant to §363, of the New York Retirement and Social Security Law (RSSL). (Appendix J.)

On October 13, 1984, Petitioner incurred an on-the-job accidental injury to his right knee. Said injury and disability forced Petitioner to take sick leave from work. When he returned to work, Petitioner's assignment was in the nature of desk duty in the Communications Section as an accommodation for his disability.

In February of 1989, Petitioner was involuntarily transferred back to road patrol, even while he continued to request and

require accommodation for his disability, and while other similarly situated Troopers, male and female, disabled or otherwise, were allowed to remain stationed in similar "constructive light duty" assignments for periods exceeding eight years, some until their eventual retirement.

Petitioner, Miszko, filed a grievance with his supervisors protesting the involuntary transfer and requested that he be returned back to the Communications Section. (Appendix M.) His grievance pursuant to a contractual collective bargaining agreement and policy manuals, in effect at the time, have not been accomplished as of this date.

On March 13, 1989 Petitioner was again accidently injured while at work. Petitioner re-injured his knee and injured his lower back, resulting from a high speed pursuit and altercations with a persistent felony drunk driver.

Respondents subjected Miszko to a continuing course of harassment and discrimination by reason of his disabilities and the discrimination still continues to date. Petitioner was further denied reasonable accommodations for work or promotions, was advised that the Americans with Disabilities Act or Rehabilitation Act does not apply to troopers because the State Police do not have any light duty or other similar accommodations. Petitioner suffered and continues to suffer the effects of such discrimination, misinformation, and continuing delays, not only by the aforementioned Respondents but also by the union representing the troopers, and in his health care treatment and benefits under the New York Workers' Compensation System.

As a result of Respondents harassing and discriminatory treatment of Petitioner, Miszko suffered and continues to suffer, with each passing day, from the effects of the extreme emotional distress that resulted in anxiety attacks, anger, nausea and vomiting, severe headaches, depression, diarrhea, cold chills,

muscle cramps and spasms, sweats and nervousness, for which he still requires medical care and treatments.

On or about January 15, 1990, Petitioner was surprised when he learned that Respondents Anton and Constantine filed an application to retire him on December 12, 1989 under §363-b, RSSL, (the 50% retirement plan), despite his numerous requests to return to work. (Appendix K.) Respondents Anton and Constantine refused to file a separate and distinct §363, RSSL application (the 75% retirement plan) to retire Petitioner on accidental disability, despite his NYS contractual Constitutional rights, despite his Tier 1 status with the Retirement System, and despite Respondents' conceding that Petitioner incurred a permanent accidental disability.

Petitioner, Miszko, is now a 53 year old white male who has been determined by the Respondents and others to be permanently disabled. Although Petitioner is permanently disabled and was over 40 years of age at the time of his involuntary retirement, he was capable of performing his job in the Communications Section as a State Trooper with reasonable accommodation, despite his age, race and disability. Respondents State of New York, Division of New York State Police, Anton and Constantine, denied Petitioner said reasonable accommodations and opportunities for work and promotions and involuntarily forced him to retire.

On January 18, 1990, Petitioner filed an application for Accidental Disability pursuant to §363, RSSL, (75% plan). (Appendix E, pages 200a [now E-9], 239a [now E-14]; Appendix K.) Six days later, on January 24, 1990 (Appendix E, pg. 203a-1 [now E-11].), the Retirement System Respondents wrongfully denied the application claiming that Petitioner was only eligible for the lesser benefits under §363-b, subd. a., RSSL (50% plan). Section 363-b, subd. a., also incorporates therein a

provision for the §363, RSSL, accidental disability 75% plan. (Appendix J, K.)

On May 29, 1991, Petitioner filed an application for Performance of Duty disability pursuant to §363-c of the RSSL, which also incorporates therein §363, RSSL, accidental disability but with different eligibility dates, in order to invoke the §363 RSSL, accidental disability provision. (Appendix G, J.) The Respondent Retirement System officials again wrongfully denied said application on July 21, 1994, August 24, 1994. (Appendix G.)

On January 3, 1994, after attempting to exhaust all his administrative remedies, Petitioner timely filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) charging Respondents State Police and Retirement System with violations of the Americans With Disabilities Act (ADA) of 1990. 42 U.S.C. §12101 et seq. A Notice of Right To Sue was issued and Substantive Weight Review initiated when Counsel for Petitioner filed this lawsuit in U.S. District Court, Southern District of New York, on February 16, 1995. (Appendix N.)

The basis for federal jurisdiction in the court of first instance as stated in the original verified complaint was "a civil action seeking monetary damages and affirmative relief pursuant to 42 U.S.C. §1983 to redress the deprivation under ordinance, custom and usages of all rights, privileges and immunities secured to the plaintiff by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States, as well as by 42 United States Code Sections 1981, 1985 and 1988, and all the laws and statutes thereunder and further seeking, pursuant to Rule 57 of the Federal Rules of Civil Procedure, a judgment declaring Sections 363-b and 363-c(h) of the New York State Retirement and Social Security Law Unconstitutional, and

further pursuant to 20 U.S.C. §794, and 42 U.S.C. §12101." (Appendix E, page 1 [now E-1].)

The Judgment and Memorandum Order from the U.S. District Court dated July 1, 1996 and July 3, 1996, respectively, granted Defendants' motion to dismiss in it's entirety and denied Plaintiff's motion to file an amended complaint. (Appendix B.)

Thereafter, on July 31, 1996, Plaintiff timely filed his Notice of Appeal to the U.S. Court of Appeals For The Second Circuit of New York. (Appendix E, page 335a [now E-89].) Oral arguments were heard on September 8, 1998 and an unpublished Summary Order was issued on September 21, 1998 affirming the judgment of the district court. A Mandate was issued on October 13, 1998. (Appendix A.)

During all the above periods of time, Petitioner requested of several state officials including the Governor, Respondent State Police, the legislature, and the New York State Comptroller, to legislatively amend §363-b, RSSL, to end the disparate treatment received by pre-1972 members of the Retirement System such as Miszko. The aforesaid request was never followed through and §§363-b and 363-c, RSSL, as applied, continued to discriminate against Petitioner and others similarly situated.

On September 17, 1997, after the district court judgment on July 1, 1996 but prior to the second circuit's Summary Order of September 21, 1998, New York Senate Bill 4439 was signed into law as chapter 598 of the Laws of 1997. (Appendix F.) The new law amended §363-b (a) and removed the provision which restricted state police in Miszko's position to disability benefits at the 50% rate under §363-b. The amendment was designed to apply "retroactively to the date of retirement for all employees who would receive an increase in benefits." L. 1997, c. 598, § 2. Petitioner was found to be entitled for and is

receiving the accidental disability benefits he sought under his first cause of action and pursuant to §363, RSSL.

Since Petitioner's disability retirement from the New York State Police, the Respondents, including the insurance carrier for the State of New York under the Workers' Compensation System, The State Insurance Fund (SIF) and Pecoroni, have denied Petitioner reasonable accommodations for his disabilities, reasonably necessary medical care and treatment of his disabilities and for his out of pocket reasonably necessary medical expenses; notwithstanding respondents granting similar considerations to other disabled members. All contrary to the laws cited herein having been made and provided for disabled individuals in Petitioner's position.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully requests this Honorable Court to grant this Petition for Writ of Certiorari based on a compelling need for this Court's exercise of supervisory powers with respect to the unpublished decisional Summary Order issued by the U.S. Court of Appeals For The Second Circuit of New York on September 21, 1998. (Appendix A.) The second circuit has entered a decision in conflict with similar decisions of this U.S. Supreme Court and other U.S. Court of Appeals on similarly important public and national matters; and, has so far departed from the accepted and usual course of stare decisis and judicial proceedings to even have sanctioned such a departure by a lower U.S. District Court. (Appendix B.)

Petitioner will show to this Court why the decision below was erroneous requiring reversal by presenting his arguments of the questions presented below and the necessity of having this U.S. Supreme Court ultimately decide questions of national importance not only for Petitioner but also for others similarly situated.

1. Whether Petitioner is barred by the statute of limitations if he timely proceeded to exhaust all his administrative remedies for accidental disability retirement benefits pursuant to §§363, 363-b and 363-c, of the New York State Retirement and Social Security Law (RSSL) and timely filed the Complaint in this action subsequent to his latter §363-c RSSL claim.

The Petitioner is not barred by the statute of limitations when he timely filed the instant action in U.S. District Court on February 16, 1995. (Appendix E, page 4a [now E-3].) Petitioner, even prior to his retirement, was engaged in the pursuit of exhausting his administrative remedies under the above New York State statutes and their attendant administrative proceedings.

On December 12, 1989, Respondents Anton and Constantine filed for Petitioner's State Police Disability Retirement (50% of final average salary plan) pursuant to §363-b, RSSL, that was later approved on February 2, 1990. (Appendix E, pages 197a [now E-7], 203a-1 [now E-11].) Petitioner, based on his longevity as a Tier 1 member of the New York State Retirement System, was statutorily and contractually entitled to Accidental Disability benefits (75% of final average salary plan) pursuant to the separate §363, RSSL.

On January 18, 1990, Petitioner filed an application for Accidental Disability (75% plan) pursuant to §363, RSSL. (Appendix E, pages 200a [now E-9], 239a [now E-14]; Appendix K.) Six days later the Retirement System Respondents wrongfully denied the application on January 24, 1990 (Appendix E, page 203a-1.), claiming that Petitioner was *only* eligible for the *lesser* benefits under §363-b, subd. a., RSSL (50% plan). Section 363-b, subd. a., also incorporates therein a provision for the §363, RSSL, accidental disability 75% plan. An administrative hearing was held on May 31, 1990 and a decision denying

the application for Accidental Disability Retirement was made on March 12, 1991. (Appendix E, page 60a [now E-6].)

On May 29, 1991, Petitioner filed an application for Performance of Duty disability pursuant to §363-c, RSSL, which also incorporates therein §363, RSSL, accidental disability benefits but with different eligibility dates; in order to invoke the §363 RSSL, accidental disability provision. (Appendix J, L.) A second administrative hearing was held on September 17, 1993 and the Respondent Retirement System officials again denied said application on July 21, 1994. (Appendix G; Appendix A, page 2.)

Respondent's counsel argues that this last application was tantamount to a request for reconsideration. (Appendix E, page 218a [now E-13].) Petitioner disagrees. A request for reconsideration generally involves looking at the same matter a second time because something may have been overlooked or misunderstood. In Petitioner's case, he was in the process of exhausting all his administrative remedies by applying under a separate section of law, §363-c, RSSL, in order to invoke the separate accidental disability benefit under different, yet more applicable, triggering dates. This required a new hearing on the matter which Respondent retirement system members granted but later denied Petitioner's application again based on §363-b, RSSL.

Therefore, Petitioner was not untimely in filing this lawsuit on February 16, 1995, seven months after the last determination made on his separate and different retirement applications on July 21, 1994, and in an effort to avail himself of and exhaust all his administrative remedies. Further, at oral argument before the second circuit on September 8, 1998 Petitioner reiterated this same fact to the justice who raised the statute of limitations question. (Transcript requested but not yet received.)

Alternatively, the denial of Petitioner's vested retirement benefits in violation of contractual and Constitutional mandates would be an appropriate subject of this action pursuant to 42 U.S.C. §1983 based on serial and systemic on-going continuing violations. A "serial" violation is deemed to be "continuing" because it keeps happening. A "systemic" violation has roots in a discriminatory policy or practice and if continued into the limitations period, Petitioner is deemed to have filed a timely complaint. (Appendix C, pages 19-22; Appendix D, pages 44-48.)

In Petitioner's case, all his claims are not barred since the accrual of his claim or continuing violations of an unconstitutional law (§363-b RSSL), age, race, sex and disability discrimination were still occurring on February 16, 1995, and some still continue even to this day and are not continuing violations that occurred in the past.

Because of the on-going nature of the discrimination alleged, and the *Burke v. Sugarman*, 35 N.Y.2d 39, 315 N.E.2d 772, 358 N.Y.S.2d 715 (1974) analysis, *"...failure to comply with constitutional requirements...is a continuing and constitutional wrong"*, provides a sound basis for dismissing a statute of limitations defense. See also *Cash v. Bates*, 301 N.Y. 258, 261, 93 N.E.2d 835, 836 (1950). (Appendix D, pages 44-48.)

Among the continuing wrongs are the on-going breach of his contractual relationship with respect to his unanswered grievance, not being afforded the opportunity of being provided with reasonable accommodation for his disabilities pursuant to the provisions of either the Rehabilitation Act and/or the Americans With Disabilities Act (ADA) of 1990 even though other similarly situated, *male and female*, troopers were granted such accommodations. Petitioner alleges in his 12th, 13th, and 14th causes of actions of his Amended Complaint (Appendix E, pages 264a-266a [now E-30 - E-32].) and accompanying

Memorandum of Law (Appendix E, pages 269a-313a [now E-34 - E-87].) that the discrimination against him continues to date, preventing him from earning his full salary and promotion potential. Stated differently, Petitioner claims that the New York State Police do not make provisions for "light duty." This illegal per se policy was in place at the time of Petitioner's forced retirement and continues to date. Thus, the violations of Petitioner's rights are serial, because they keep happening, and systemic. A systemic violation "has its roots in a discriminatory policy or practice." So long as the policy or practice continues into the limitations period, a challenger may be deemed to have filed a timely complaint even though his initial "harm" may have occurred at an earlier date. *Jensen v. Frank*, 912 F.2d 517, 522-523 (1st Circuit); *John v. Rodriguez*, 943 F.2d 104 (1st Cir. 1991).

Continuing violations are not a new and novel rule or theory of law as Respondents' counsel attempts to argue. As the Sixth Circuit held in *Hall v. Cuyahoga Valley Board of Education*, 926 F.2d 505, 511 (6th Cir. 1991):

> "There are important policy reasons not to require that a discrimination suit be filed at the first instance of discrimination or not at all. To do so, would frustrate the broad remedial purposes of the Civil Rights Law which encourage the eradication of discrimination."

The Tenth and Seventh Circuits have also stated:

> A continuing violation generally arises in the context of unconstitutional employment discrimination. It is usually based on a showing that an employer continues to implement an illegal system or policy, such as race discrimination . . . . If employment decisions made under that policy result in constitutional violations within the limitations period, a continuing violation may

> be shown. A suit challenging systemic policy is not barred even though the policy began before the limitations period, because the policy itself continues to violate employees' rights. . .. *Pike v. City of Mission*, 731 F.2d 655, 660 (10th Cir. 1984). Judge Posner explained that *the only justification for treating a series of separate violations as a single continuing violation is that* **"it would have been unreasonable to require plaintiff to sue on each one."** *Malhorta v. Cotter Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989). (Emphasis added.)

Respondents' subjected Miszko to a continuing course of harassment and discrimination by reason of Miszko's disability, including but not limited to, his age, race, and sex. The discrimination and discriminatory policies by all the Respondents still continues to harm him to this date by being denied reasonable accommodations and opportunity for work and promotions; notwithstanding Petitioner having excellent performance ratings while he was employed. Petitioner suffered and continues to suffer the damaging effects of such discrimination, misinformation, and continuing delays, and in his health care treatment and benefits under the New York Workers' Compensation/SIF System.

The Fifth Circuit found that "federal courts possess the power to use equitable principles to fashion their own tolling provisions in exceptional situations in which state statutes of limitations eradicate rights or frustrate policies created by federal law." *Rodriguez v. Holmes*, 963 F.2d 799, 805 (5th Cir. 1992).

The Fifth Circuit stated that "[t]o establish a continuing violation..., the plaintiff must establish that the unconstitutional or illegal act was a part of 'standard operating procedure,' a fixed and continuing practice." *Perez v. Laredo Junior College*, 706 F.2d 731, 733 (5th Cir. 1983).

To date, the New York State Police do not maintain any "light duty" or positions of reasonable accommodation that Petitioner is aware of. Thus, Petitioner is not barred by the statute of limitations under either the continuing violations theory or the three year statute of limitations imposed for the *most analogous state action*, for general personal injuries under N.Y. CPLR §214(5), as long as the state law does not conflict with federal law or policy. *Okure v. Owens*, 625 F.Supp. 1568, 1569 (N.D.N.Y. 1986), affd. 816 F.2d 45 (2d Cir. 1987), affd. 488 U.S. 235 (1989) (citations omitted). (Appendix D, page 47.)

2. Whether Petitioner is barred by any theory of preclusion if he filed a grievance with his employer and was subsequently involuntarily retired for disability reasons by his employer without completion of the grievance process according to policy and contractual collective bargaining agreement in effect at the time.

On October 13, 1984, Petitioner incurred an on the job injury requiring major arthroscopic surgery to his right knee followed by a lengthy period of therapy and recuperation. Upon his return to work, Petitioner's newly agreed to (by Petitioner and his supervisors) assignment was in the nature of desk duty in the Communications Section as an accommodation for his disability. Petitioner replaced another trooper who had worked in the same communications assignment for a period of eight years until his retirement.

On February 18, 1989, Petitioner was involuntarily transferred back to a road assignment, contrary to his doctors concerns against him being placed in a position where he might re-injure himself or cause others to suffer injury, and the agreements made with his supervisors to remain in the Communications Section, as an accommodation for his disability.

Petitioner, shortly before being transferred filed a grievance on January 27, 1989 with his supervisors protesting the involuntary intra-troop transfer as arbitrary and capricious, discriminatory, without seniority concerns, and requested to be returned back to the communications Section. (Appendix M.) His grievance fell on deaf ears and has not been resolved as of this date. (Appendix E, page 15a, ¶30 [now E-5], page 256a, ¶41 [now E-23].)

Counsel for the Respondents during his oral argument before the U.S. District Court stated that since the grievance was not answered, that meant it was answered in the negative. Petitioner disagrees with the above statement based on the necessity of possibly making timely grievance appeals after decisions are rendered pursuant to published timetables so that both parties are not prejudiced in any way by bad motives. The grievance procedure was outlined in the Agreement between the State of New York and the P.B.A. of the New York State Troopers, Inc. and in the New York State Police Manuals in effect at that time. Petitioner's grievance was never officially resolved nor did he have the opportunity to appeal anything because the grievance process was short-circuited for some unknown reason(s).

On March 13, 1989, while working the graveyard shift on road patrol, Petitioner was again accidently injured after a high speed pursuit involving a persistent felony drunk driver who struck Petitioner with his vehicle and subsequent scuffles with the driver during the arrest process. Petitioner was subsequently forced to retire because of his disabilities, never returned to work, and never received a final resolution of his grievance.

Despite Counsel for Respondents contentions that mere passivity is insufficient to establish a bad motive, the U.S. Court of Appeals in *Johnson v. Palma*, 931 F.2d 203 (2d Cir. 1991), (citing *Lukens*, 482 U.S. 666 (19--)), disagreed by stating, "we

think that the refusal to proceed with the grievance process because of a company policy amounts to more than mere passivity."

The statute of limitations governing §1983 actions is not provided by federal law. In the absence of such a provision, "the courts will generally apply the statute of limitations for the most analogous state action, as long as the state law does not conflict with federal law or policy." *Okure v. Owens*, 625 F.Supp. 1568, 1569 (N.D.N.Y. 1986), affd. 816 F.2d 45 (2d Cir. 1987), affd. 488 U.S. 235 (1989) (citations omitted).

Unlike in *Okure, supra,* where the Court held that the "most analogous state action" was one for general personal injuries under N.Y. CPLR §214(5). In this case, one of the many claims involves an unanswered contractual grievance with resulting disability, age, race and sex, discrimination. It would therefore seem "most analogous" to apply the six year statute of limitations period for contract obligations pursuant to New York CPLR §213(2).

Section 213(2) states in pertinent part:

> "The following actions *must* be commenced within six years: (2) an action upon a *contractual obligation* or liability, express or implied. . .," (NY McKINNEYS, §213(2))

Each day brings a new date of harm for the Petitioner based on, among other things, his continuing unanswered grievance. Therefore, based on the above arguments, the statute of limitations defense or any other theory of preclusion is now moot.

Appellant does not feel the above law will conflict with federal laws or policies. If anything, it would aid in the imple-

mentation of the aforementioned laws and bring a just and equitable solution to a dilemma that has plagued the Petitioner and many other similarly situated New York State Troopers who have fallen prey to this type of discriminatory treatment and conduct.

3. Whether Petitioner is barred from filing the instant action subsequent to timely filing a complaint with the Equal Employment Opportunity Commission (EEOC)and receipt of Notice of Right To Sue but during his appeals for fact-finding and substantive weight review processes.

While in the process of exhausting all his administrative remedies, Petitioner had learned during an administrative Retirement System hearing on September 17, 1993 that his §363-c, RSSL application would be denied and timely filed a Charge of Discrimination on January 3, 1994, within the requisite 300 days, with the Equal Employment Opportunity Commission (EEOC). (Appendix N.) Petitioner charged Respondents State Police and Retirement System with violations of the Americans With Disabilities Act (ADA) of 1990. 42 U.S.C. §12[illegible] *et seq.* See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).

During the EEOC's alleged investigation of Petitioner's charge of discrimination, he learned that their investigation was less than adequate. The EEOC did not forward his complaint to any of the Respondents or the New York State Division of Human Rights Agency (Appendix E, page 326a [now E-88].), did not contact his employer, refused to amend the charge to add necessary parties as he disclosed to their investigators during the intake process, and summarily dismissed his complaint based on "No Employee-Employer Relationship" (Appendix N.), after being forced to retire.

A Notice of Right To Sue was issued on October 26, 1994 apparently without anything being accomplished. (Appendix N.) No contact with Petitioner or others regarding the complaint/charge was made after the initial intake process until receipt of the Notice of Right To Sue. Petitioner requested a fact-finding conference and/or Substantive Weight Review but his requests were denied. Petitioner's Counsel, at that time, filed a complaint in U.S. District Court, S.D.N.Y., on February 16, 1995.

It seems very unfair to Petitioner that the EEOC, a federal agency charged with the responsibility of eradicating discrimination against disabled individuals, also discriminated against Petitioner. More importantly, if Petitioner was given the opportunity and prevailed during the Substantive Weight Review process, this lawsuit may not have been filed. To hold rigidly to the ninety (90) day filing period after receipt of Notice of Right To Sue appears, at first blush, to open the flood gates to the federal judicial system with cases that may be resolved during the Substantive Weight Review process if there was ample time to rebut the EEOC's findings. Without sufficient time to rebut and for the EEOC to verify and respond, there is the possibility that the Substantive Weight Review process is not actually a process but rather - only a name. Especially, as in the instant case, when dealing with the blatant inadequacy of the EEOC's investigative efforts with respect to this Petitioner.

Therefore, based on the absence of specific case law with respect to bringing suit in the United States District Court *after* receipt of a Notice of Right To Sue but during the fact-finding and/or Substantive Weight Review processes, is a matter of national importance not only this Court but also to Petitioner and others who are or may find themselves similarly situated. And, for this and other reasons, Petitioner respectfully requests review of the above question while considering the constraints on the EEOC and repeats again the Sixth Circuit's holding in

Hall v. Cuyahoga Valley Board of Education, 926 F.2d 505, 511 (6th Cir. 1991):

> "There are important policy reasons not to require that a discrimination suit be filed at the first instance of discrimination or not at all. To do so, would frustrate the broad remedial purposes of the Civil Rights Law which encourage the eradication of discrimination."

4. If Petitioner's lawsuit is not barred by the statute of limitations, whether the Courts below erred by dismissing all his claims and denying leave to amend the Complaint.

The U.S. District Court below erred by dismissing Petitioner's complaint in its entirety and denying him leave to amend his complaint. (Appendix B.) The U.S. Court of Appeals for the Second Circuit of New York erred in affirming and sanctioning the District Court's determination and now requires reversal. (Appendix A.) If Petitioner's lawsuit is not barred by the statute of limitations, then he must be permitted to proceed forward.

The U.S. Supreme Court, and various Circuit Courts, in appraising the sufficiency of a complaint has put forth the accepted rule that Petitioner's complaint should **not** be dismissed for failure to state a claim unless it appears **beyond doubt** that the Petitioner can prove no set of facts in support of his claims which would entitle him to relief. **F.R.C.P., Rule 12, 28 U.S.C.A.** See also, *Conley et al v. Gibson et al*, 355 U.S. 41 (1957) citing *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Leimer v. State Mutual Life Asur. Co.*, 108 F.2d 302 (8th Cir. 1940); *Dioguardi v. Durning*, 139 F.2d 774 (2nd Cir. 1944); and, *Continental Collieries v. Shober*, 130 F.2d 631 (3rd Cir. 1942).

Petitioner's case is fact intensive and this may possibly be a reason why Respondents counsel filed a motion to dismiss so early in these and other proceedings. Further, the claims presented are not similar to claims presented in state courts and res judicata and collateral estoppel does not apply. (See Appendix C, pages 34-42). This case requires further review and development before being summarily decided upon.

Petitioner, whether in the State Courts or in a Federal forum has been denied the opportunity to proceed to trial to have his issues fully and fairly litigated or decided on the merits. This injustice by the State and Federal Courts requires closer scrutiny beyond mere complaint and motion submissions.

Under the Federal Rules, pleading is not a game of skill where possibly one stumble by Petitioner's counsel will decide the outcome. The accepted purpose of pleading is *to facilitate a proper decision on the merits.* **F.R.C.P., Rules 8(a)(2)(f), 12(c, e, f), 15, 16, 26-37, 56, 28 U.S.C.A.** The Federal Rules of Civil Procedure do not require a Plaintiff to set forth the facts in exact detail in order to base his claim. All that the Rules require is "a short and plain statement of the claim" **(F.R.C.P., Rule 8(a)(2))** so as to provide the defendant(s) fair notice of Plaintiff's claims and grounds upon which they are based. This simplified form of "notice pleading" is permitted and accepted because of the numerous opportunities for discovery and other pretrial procedures established by the Rules to state precisely the basis of claims and defenses and to fine-tune the disputed facts and issues. See **F.R.C.P., Rule 12(e)** (motion for a more definite statement); **Rule 12(f)** (motion to strike portions of the pleading); **Rule 15** (right to amend); **Rule 16** (pre-trial procedure and formulation of issues); **Rules 26 thru 37** (depositions and discovery); **Rule 56** (motion for summary judgment). Moreover, **F.R.C.P., Rule 8(f)** states, "[a]ll pleadings shall be so construed as to do substantial justice." Not the contrary, as in this case.

Petitioner's Amended Complaint and supporting papers provide sufficient "notice pleading" to move forward. (Appendix E, pages 249a-313a [now E-17 - E-86].) The District Court should have granted Petitioner's request for leave to amend his complaint so as to remedy any pleading defect by providing a more definite statement of the Petitioner's claims (**F.R.C.P. Rules 12(e) and 15(a)**) and move forward to trier of fact as final arbiter of substantial justice.

The choice of labels should not be permitted to distort **substance**, especially where the consequence would be so drastic as to deprive this Appellant of the opportunity to be heard. *Criales v. American Airlines, Inc.*, 105 F.3d 93 (2d Cir. 1997).

Additionally, as a result of the Senate Bill No. 4439, enacted into law on September 17, 1997, as Chapter 598 of the Laws of 1997 (Appendix F.), Petitioner is prepared to concede that his appeal as to the issue of constitutionality of the impairment language of §§363-b and 363-c (h) RSSL, is now moot. Petitioner is receiving his rightful Accidental Disability Retirement benefits retroactive to his date of retirement but without interest accruals.

The Petitioner, however, still has claims asserted in his complaint for compensatory damages or back pay against respondents in their individual and official capacities. These damages, whether they arise from the unconstitutional application of the statute in issue, or from the Americans With Disabilities (ADA)/Rehabilitation Act claims, or from the §1983 claims, preclude a dismissal for mootness. If the Respondents voluntarily cease the conduct about which the Petitioner is complaining, this will normally **not** be enough to make the entire case moot. If the Petitioner seeks damages, as here, the cessation will be irrelevant to the issue of mootness. See **Lawrence Tribe, *American Constitutional Law*,** at pg. 89, (Foundation Press,

2nd Ed. 1988); *City of Richmond v. J. A. Croson Company*, 488 U.S. 469, Footnote 1, (1989); *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 8-9 (1978); *Firefighters Local 1784 v. Stotts*, 467 U.S. 561, 571 (1984); *Sykes v. Village of Wurtsboro*, 818 F.2d 4 (2d Cir. 1987). The enactment of Senate Bill No. 4439 may have mitigated some of Appellant's damages but it certainly has not totally abrogated the question of damages.

Since Petitioner's disability retirement from the New York State Police on February 15, 1990, he has attempted to right the wrongs foisted upon him by Respondents, including The State Insurance Fund (SIF) (carrier) for the New York Workers' Compensation System, Pecoroni, and other unnamed agents, by denying Petitioner reasonable accommodations for his disabilities (including being struck by a consultant during a routine medical examination), salary and promotional advancements, reasonably necessary medical care and treatment of his disabilities, and for his out of pocket reasonably necessary medical expenses; notwithstanding Respondents granting reasonable accommodations to other disabled members. All these actions by Respondents are intolerable and contrary to the laws cited herein and in Petitioner's Briefs appendixed hereto having been made and provided for Petitioner and other individuals similarly situated.

CONCLUSION

For all the aforementioned reasons and in Petitioners Briefs submitted to the Courts below, and annexed hereto, the Petition For A Writ Of Certiorari should be granted.

Respectfully Submitted,

THOMAS P. HALLEY, ESQ.
Attorney for Petitioner
21 Alden Road
Poughkeepsie, New York 12603
(914) 452-9120

Dated: December 17, 1998

APPENDIX A

Appendix A - Summary Order of the United States Court of Appeals For the Second Circuit of New York, dated September 21, 1998, Mandate issued on October 13, 1998.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
(stamped: Filed September 21, 1998, Carolyn Clark Campbell, Clerk)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21 day of September one thousand nine hundred and ninety-eight.

PRESENT: HON. JOSEPH M. MCLAUGHLIN,
HON. DENNIS JACOBS,
HON. ROBERT D. SACK,
Circuit Judges.

----------X

MICHAEL MISZKO, JR.,

Plaintiff-Appellant,

-v.- 96-7963

ATTORNEY GENERAL OF THE STATE
OF NEW YORK; NEW YORK STATE POLICE;

JAMES W. MCMAHON, Superintendent of the New York State Police; THOMAS A. CONSTANTINE, former Superintendent of the New York State Police; NEW YORK STATE POLICEMAN'S AND FIREMAN'S RETIREMENT SYSTEM; H. CARL MCCALL, Comptroller; and EDWARD V. REGAN, Former Comptroller,

Defendants-Appellees.

----------X

APPEARING FOR APPELLANT: MICHAEL MISZKO, JR., *pro se*; THOMAS P. HALLEY, Poughkeepsie, NY

APPEARING FOR APPELLEE: STEPHEN M. JACOBY, Assistant Attorney General, New York, NY

Appeal from the United States District Court for the Southern District of New York (Rakoff, J.).

ISSUED AS MANDATE. Oct. 13, 1998

Received: 10/15/98

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
(stamped: Filed September 21, 1998,
Carolyn Clark Campbell, Clerk)

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21 day of September one thousand nine hundred and ninety-eight.

PRESENT: HON. JOSEPH M. MCLAUGHLIN,
HON. DENNIS JACOBS,
HON. ROBERT D. SACK,
Circuit Judges.

----------X

MICHAEL MISZKO, JR.,

Plaintiff-Appellant,

-v.- 96-7963

ATTORNEY GENERAL OF THE STATE OF NEW YORK; NEW YORK STATE POLICE; JAMES W. MCMAHON, Superintendent

of the New York State Police;
THOMAS A. CONSTANTINE, former
Superintendent of the New York State Police;
NEW YORK STATE POLICEMAN'S AND
FIREMAN'S RETIREMENT SYSTEM;
H. CARL MCCALL, Comptroller; and EDWARD
V. REGAN, Former Comptroller,

Defendants-Appellees.
----------X

APPEARING FOR APPELLANT: MICHAEL MISZKO, JR., *pro se*; THOMAS P. HALLEY, Poughkeepsie, NY

APPEARING FOR APPELLEE: STEPHEN M. JACOBY, Assistant Attorney General, New York, NY

Appeal from the United States District Court for the Southern District of New York (Rakoff, J.).

Received: 9/23/98

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel and by appellant *pro se*.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is **AFFIRMED.**

Miszko challenges his involuntary retirement by the state police and the calculation of his disability pension. Michael Miszko was a police officer in Kingston, New York and a

member of the New York State Policemen's and Firemen's Retirement System ("the P&F System") from 1968 until September 11, 1969, when he became a corrections officer and thereby entered the New York State and Local Employees' Retirement System ("ER System"). On June 29, 1970, Miszko again changed jobs, this time leaving New York public service entirely. On September 6, 1973, he returned to state employment when he was appointed a state trooper and he again joined the P&F System. On March 13, 1989, Miszko reinjured his knee and injured his back so badly that he sustained what he described in a verified court petition as a "disabling career-ending injury" which the State Comptroller subsequently found "permanently incapacitated Miszko from the performance of his duties." In 1990, he was involuntarily retired by the State Police.

On February 16, 1995, he filed the complaint in this action. He sued the Attorney General of the State of New York in his official capacity, the New York State Division of State Police and the present and former Superintendents of the State Police, the P&F System and the present and former Comptroller (who administered the Retirement System). The complaint asserts three causes of action.

The first two causes of action collect numerous claims challenging the March 12, 1991 and July 21, 1994 rejections by the P&F System of plaintiff's applications for greater disability benefits than he received pursuant to N.Y. Retirement and Social Security Law ("RSSL") § 363-b. In his first cause of action, Miszko alleged that the P&F System misinterpreted or misapplied RSSL § 363-b when it determined that his entry date into the P&F System was September 6, 1973 (when he returned to New York public employment after a hiatus) rather than June 26, 1968 (when he first became a Kingston police officer). Miszko had received assurances from P&F personnel prior to his retirement that the earlier date applied. The difference in enrollment dates represented the difference between an entitlement to benefits equal to 75% of his salary and benefits equiva-

lent to only 50% of his salary. Miszko claimed that these allegedly erroneous interpretations of the law constituted a conspiracy to deprive him of property rights in his pension, of due process, of equal protection, "all in violation of the Constitution of the United States, the First, Fourth, Fifth, Ninth and Fourteenth Amendments thereof, and the Civil Rights statute...42 U.S.C. Sections 1983 and 1985." Miszko sought $2 million in compensatory damages and $2 million in punitive damages for this "cause of action" (actually a melange of several claims), together with "such other and further damages and relief as due and required to make plaintiff whole, including performance of said employment contract; together with attorney's fees and the costs and disbursements of this action."

In the second cause of action, Miszko again complained that the defendants "wrongfully determined...[his] initial entry date," and alleged that defendants, in applying RSSL § 363-b and 363-c(h) engaged in "selective entitlement...not justified by a compelling governmental interest in violation of the Fourteenth Amendment." Under this heading, Miszko also challenges the statutes themselves as violative of the Contracts Clause, unconstitutionally vague and facially discriminatory. He seeks a declaratory judgment "declaring that Sections 363-b and 363-c(h) of the New York State Retirement and Social Security Law is[sic] inapplicable to plaintiff, or that it is illegal, void, unconstitutional and ineffective."

In his third cause of action, Miszko alleged that the defendants had discriminated against him on the basis of his disability by denying him promotions and forcing him to retire, in violation of the Rehabilitation Act and the Americans with Disabilities Act. Although this claim does not mention the Age Discrimination in Employment Act, Miszko asserted earlier in the complaint that although he was over 40, he was capable of performing his job as a trooper "with reasonable accommodation, despite his age." On this claim, Miszko again sought $2 million in compensatory damages, $2 million in punitive damages and "further demands that plaintiff be awarded back

pay and lost benefits together with reasonable attorney fees and the costs and disbursements of this action. Plaintiff further demands that the defendant be ordered to reinstate and promote the plaintiff, with full seniority."

Claims Based on Lost Retirement Benefits. On September 17, 1997, New York Senate Bill 4439 was signed into law as chapter 598 of the Laws of 1997. Effective immediately, it amended § 363b-(a) to remove the provision which restricted state police in Miszko's position to disability benefits at the 50% rate under § 363-b. The amendment was designed to apply "retroactively to the date of retirement for all employees who would receive an increase in benefits." L. 1997, c. 598, § 2.

Thus, since the district court ruled, the New York legislature has acted to provide retired troopers like Miszko with benefits at the higher rate. This Court reviews the district court's decision in light of the law "as it now stands, not as it once did." *Hall v. Beals*. 396 U.S. 45, 48, 90 S.Ct. 200, 201 (1969). As the law now stands, there is no real controversy between the parties on this central point. *See Tawwab v. Metz*, 554 F.2d 22, 23-24 (2d Cir. 1977) (*per curiam*) (prisoners' challenge to alleged policy concerning attorney visitation mooted by change in policy which was embodied in official prison document).

Miszko is now entitled to the benefits he sought under his first cause of action, and his second cause of action, seeking a declaratory judgment, is also moot, because the legislature has amended the allegedly unconstitutional statute. See *Diffenderfer v. Central Baptist Church,* 404 U.S. 412, 92 S. Ct. 574 (1972) (attack on tax exemption for church property used as a commercial parking lot mooted by subsequent statute that allowed exemption only if church property was used primarily for religious purposes). Appellee asserts that Miszko has in fact already applied and found eligible for the increased benefits. Miszko concedes that the claim will be moot once plaintiff receives the check at the higher rate, but of course actual receipt of the money is not the standard. There is no live controversy as to plaintiff's entitlement to the 75% rate, which the legislature

has expressly made retroactively applicable; if the check turns out to be for some lesser amount, Miszko has a remedy under the newly-enacted statute, but any such claim is not yet ripe.

Discrimination Claims. As the district court correctly held, Miszko cannot sustain a claim under the Americans With Disabilities Act, because that statute was enacted in 1992 and does not apply to preeanctment conduct. *See Smith v. UPS, Inc.*, 65 F.3d 266, 266 (2d Cir. 1995). Because plaintiff's termination took place in 1990, he cannot state a claim under the ADA.

Miszko's Rehabilitation Act and Age Discrimination in Employment Act claims are also untimely. Miszko concedes that his claims would be untimely under the applicable statutes of limitations, but contends that he is entitled to the benefit of a "continuing violations" exception because he is even now feeling the effects of defendants' alleged discrimination. We rejected just such a claim in *Lightfoot v. Union Carbide Corp.*, 110 F. 3d 898, 907-08 (2d Cir. 1997), stating: "A continuing violation is not established merely because an employee continues to feel the effects of a discriminatory act on the part of the employer. To hold otherwise would render meaningless the time limitations imposed on discrimination actions." *See also Malarkey v. Texaco*, 559 F. Supp. 117, 121 (S.D.N.Y. 1982) ("Completed acts such as a termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment are not acts of a 'continuing' nature."), *aff'd*, 704 F.2d 674 (2d Cir. 1983) (*per curiam*).

We have considered Miszko's remaining arguments and find them to be without merit. The judgment of the district court is **AFFIRMED**.

FOR THE COURT:
CAROLYN CLARK CAMPBELL,
CLERK
BY: *(Lucille Carr signature)*
Lucille Carr, Deputy Clerk

APPENDIX B

Appendix B - Judgment and Memorandum Order by Jed S. Rakoff, U.S.D.J., of the United States District Court for the Southern District of New York, dated, respectively, July 1, 1996 and July 3, 1996.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

Michael Miszko, Jr.,

Plaintiff,

95 CV01111 (JSR)

-against-

JUDGMENT

Attorney General of New York State, New York State Police, James W. McMahon, Superintendent of the New York State Police, Thomas A. Constantine, former Superintendent of the New York State Police, New York State Policemen's and Firemen's Retirement System, H. Carl McCall, Comptroller, and Edward V. Regan, Former Comptroller,

Defendants,

----------X

Defendants moved to dismiss and the Plaintiff moves to amend the complaint and the said motions having come before the Honorable Jed S. Rakoff, United States District Judge and the Court therafter on June 20, 1996, having handed down its memorandum to the docket clerk granting defendants motion to dismiss and denying plaintiff's motion to amend the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

Dated: White Plains, N.Y.
July 1, 1996

U.S. District Court Filed: July 1, 1996

(James M. Parkison signature)
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MICHAEL MISZKO,
Plaintiff,

95 CV 1111
(JSR)

-against-

MEMORANDUM
ORDER

ATTORNEY GENERAL OF NEW YORK STATE, NEW YORK STATE POLICE, JAMES W. MCMAHON, Superintendent of the New York State Police, THOMAS A. CONSTANTINE, former Superintendent of the New York State Police, NEW YORK STATE POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, H. CARL MCCALL, Comptroller, and EDWARD V. REGAN, Former Comptroller,

Defendants,

----------X

JED S. RAKOFF, U.S.D.J.

This case arises from a dispute regarding the proper amount of retirement benefits due the plaintiff, Michael Miszko, a former New York State Trooper. Upon Mr. Miszko's retirement in 1990, the New York State Policemen's and Firemen's Retirement System (the "System") calculated his benefits by reference to § 363-b of the New York Retirement and Social Security Law ("RSSL"). Mr. Miszko disputed the System's determination, claiming that the calculation of his benefits should have been made pursuant to §§ 363 and 363-c of the RSSL, under which he would have received a more generous pension. Miszko unsuccessfully appealed the System's determination, first to an Administrative Law Judge, then to the New

York State Supreme Court (via an Article 78 petition), then to the Appellate Division, Third Department, and then to the New York Court of Appeals, which declined to hear the appeal, even after Mr. Miszko petitioned for reconsideration. Throughout these proceedings, except on the petition for reconsideration, Mr. Miszko was represented by counsel.

After this lengthy state court odyssey, Mr. Miszko filed the present action, alleging violations of the Civil Rights Act of 1964 and the Americans with Disabilities Act and challenging the constitutionality of the state statute pursuant to which his benefits had been determined. The defendants moved to dismiss the complaint in its entirety on a variety of grounds. In response, plaintiff, while asserting the validity of some of his claims, also sought leave to amend his complaint in an effort to cure admitted deficiencies in the remaining claims.

Having reviewed the submissions of the parties, the Court heard oral argument on June 19, 1996, at which time it dismissed certain of the claims set forth in the original complaint and reserved decision on the remaining claims and on the motion to amend. Having now further considered the matter, the Court herewith reconfirms the rulings made at the oral argument and rules upon the remaining matters, as follows:

As stated at oral argument, the claims against the Attorney General are dismissed. In a civil rights action challenging the constitutionality of a New York law as applied to a particular plaintiff, where the Attorney General has had nothing to do with the underlying application of the law giving rise to the cause of action, the mere fact that the Attorney General is bound to enforce the laws of New York does not make him a proper defendant. *Gras v. Stevens*, 415 F. Supp. 1148, 1151 (S.D.N.Y. 1976); *United States of America v. City of Yonkers*, 880. F. Supp. 212, 230 (S.D.N.Y. 1995).

As also stated at oral argument, the claims brought under 42 U.S.C. § 1981 are dismissed as to all defendants. A claim under that section must plead that the alleged deprivation of rights was on account of the plaintiff's race, ethnicity, or national origin.

Carrero v. New York City Housing Auth., 890 F.2d 569, 575 (2d Cir. 1989). Because the complaint is devoid of any such allegation, the claims must be dismissed for want of jurisdiction. *Id.*

Leave to amend the complaint to cure this pleading defect is denied, because such amendment would be futile. *Azurite v. Amster & Co.*, 52 F.3d 15, 19 (2d Cir. 1995). The § 1981 claim cannot be successfully repleaded because the conduct here at issue predates the effective date of the statutory section, and the section does not apply to preenactment conduct. *Rivers v. Roadway Express, Inc.*,114 S. Ct. 1510, 1513 (1994).

Similarly, the claim brought under the Americans With Disabilities Act is dismissed and leave to replead is denied because that Act did not become effective until July 26, 1992, two years after the plaintiff's employment ended, and it does not apply retroactively. *Bent v. Mount Sinai Medical Center*, 94 Civ. 8027 (JGK), 1995 WL 244336 at *1 (Apr. 27, 1995); Pub. L. No. 101-336, 104 Stat. 327, §108 (1990).

In addition, the § 1981 claim is time-barred, as are the other claims brought under the Civil Rights Act, *i.e.*, the claims brought under 42 U.S.C. §§ 1983 and 1985. The conduct at issue here took place at least four years ago, and yet the provisions under which plaintiff has brought suit are all subject to a three year statute of limitations. *Hernandez-Avila v. Averill*, 725 F.2d 25, 27n.3 (2d Cir. 1984) (three year statute of limitations for § 1985 claims); *Singleton v. City of New York*, 632 F.2d 185, 189-90 (2d Cir. 1980) (three year statute of limitations for § 1983 claims), *cert. denied*, 450 U.S. 920 (1981); *Paschall v. Mayone*, 454 F. Supp. 1289, 1293 (S.D.N.Y. 1978) (§§ 1981, 1983 and 1985 claims subject to three year statute of limitations). For this reason, the § 1983 and § 1985 claims must also be dismissed, and leave to replead them must also be denied, since no amount of repleading could make these claims timely.

Nor does the Court find convincing the argument advanced by the plaintiff at oral argument that a new rule of law should be adopted under which the statute of limitations for civil rights

cases would not begin to run while any plaintiff still felt the consequences of the alleged wrong. In the vast majority of civil rights cases, such a rule would be the same as saying there simply is no statute of limitations. The Court declines to impose such a rule.

In addition, as stated at oral argument, the § 1985 claim is deficient on its face. A necessary element of a claim brought under this section is an allegation of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403: U.S. 88, 102 (1971). The complaint contains no well-pleaded allegations meeting this standard.

Turning to the matters as to which the Court reserved decision, the first issue is whether plaintiff's constitutional claims are barred by collateral estoppel. It is undisputed that in the prior action in New York State Supreme Court arising from the same underlying allegations, plaintiff explicitly raised claims under the federal constitution similar or identical to the claims made here, and that the state court expressly considered and rejected these claims. Plaintiff argues, however, that collateral estoppel should not bar this action because the federal constitutional arguments made in the plaintiff's memorandum of law filed before the New York State Supreme Court were unaccompanied by citations to legal authority. *Cf. Newman v. Board of Educ. of the City School Dist. Of New York*, 508 F.2d 277, 278 (2d Cir. 1974), cert. denied, 420 U.S. 1004 (1975). While the spare nature of plaintiff's constitutional argument in the state court might have been a basis for that court's declining to reach the issues, instead that court expressly considered and rejected the federal constitutional claims. And while the state court's rejection was equally spare, this in no way implies a failure to consider the issue but rather can be seen as an implicit commentary on the merits. Accordingly, collateral estoppel obtains.

As to the scope of the estoppel, plaintiff argues that the constitutional claims asserted in the instant complaint include at least one previously unasserted claim — that § 363-b of the New

York Retirement and Social Security Law violates the Contracts Clause of the United States Constitution, Article 1, Section 10 — that should not therefore be barred by the determination of the constitutional claims asserted in the state action. However, a difference in legal theory does not generally permit the relitigation of claims based on the same gravamen. *Reilly v. Reid,* 45 N.Y.2d 24, 29 (1978). Moreover, as defense counsel noted at oral argument, the rulings made by the state court on the state law issues entail that plaintiff's new argument could not have been resolved in the plaintiff's favor even had it been raised in the state court; and the estoppel effect of these rulings means that the claim can not succeed here either. Thus, the claims challenging the New York statute on federal constitutional grounds are dismissed on the ground of collateral estoppel, and leave to amend the complaint is denied because any such amendment would be futile.

The only remaining claims are those asserting violations of the plaintiff's First, Fourth, Fifth and Ninth Amendment rights. There are no allegations in the complaint that make out a violation of the rights guaranteed by these amendments; these claims are pleaded in bald, conclusory fashion without any specific supporting allegations. Nor was the plaintiff able to articulate at oral argument a theory for how the facts alleged in the complaint constitute a violation of these protected rights. Therefore, having considered the arguments made by counsel and having again reviewed the original and proposed complaints and the submissions of counsel, the Court grants dismissal of these claims against all defendants on the grounds that they fail to state a claim upon which relief may be granted.

Accordingly, for the reasons set forth above, as well at oral argument and in the submissions of defense counsel (which are expressly incorporated herein), the complaint is dismissed in its entirety and leave to file an amended complaint is denied.

Clerk to enter judgment.

SO ORDERED

Dated: White Plains, New York
July 3, 1996

(Jed S. Rakoff signature)
JED S. RAKOFF, U.S.D.J.

APPENDIX C

Appendix C—Brief for Plaintiff-Appellant, Michael Miszko, Jr., U.S. Court of Appeals, 2nd Circuit of New York, Docket No. 96-7963, dated February 27, 1998

96-7963

United States Court of Appeals

For the Second Circuit

MICHAEL MISZKO, JR.,

Plaintiff-Appellant,

against

ATTORNEY GENERAL OF THE STATE OF NEW YORK; NEW YORK STATE POLICE; JAMES W. McMAHON, Superintendent of the New York State Police; THOMAS A. CONSTANTINE, former Superintendent of the New York State Police; NEW YORK STATE POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM; H. CARL McCALL, Comptroller; EDWARD V. REGAN, former Comptroller,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT MICHAEL MISZKO, JR.

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REPLY TO DEFENDANTS-APPELLEES PRELIMINARY STATEMENT

Plaintiff-Appellant, Michael Miszko, Jr., in this Reply Brief, respectfully wishes to clear up the muddied waters as a result of his State and Federal courts odyssey that resulted in an unjust "domino effect" dismissing all his claims. Appellant brings the instant action after suffering a diminution of his contractual disability retirement rights, for discriminatory and retaliatory acts by Defendants-Appellees and other unnamed co-conspirators, which include being struck in his injured right knee by agents of the State Insurance Fund, and is now seeking damages.

Appellant will first discuss his Tier 1 triggering membership dates with what is now called New York State and Local Retirement Systems, Police and Fire Retirement System; formerly known as the New York State Policemen's and Firemen's Retirement System (P&F). Appellant's eligibility for P&F membership was **mandatorily** commenced on June 26, 1968 pursuant to **§ 340, subd. b.** of the New York State Retirement and Social Security Law (RSSL). The relevance of the above date will become obvious as explained below.

The Courts below and Defendants-Appellants counsel have, respectfully, misconstrued the relevant laws and facts in this matter with respect to statutory triggering dates, jurisdiction, damages, preclusion, statute of limitations, and 11th Amendment immunity. Most notably, and the decision that initiated the subsequent "domino effect" in litigation, was the language contained in New York State Supreme Court Justice Bradley's letter (Appendix at page 46a) which states in relevant part:

"Section 343 [RSSL] also had the effect, however, of giving petitioner **only** the benefit rights (i.e., Section

363-b [RSSL]) available to the membership of the pension system **to** which he transferred." (Emphasis added.)

Section 294, subds. a. and b. RSSL, Transfer of retirement membership, etc., states in relevant part:

"a. Persons becoming members of the retirement system. . .subsequent to March thirty-first, nineteen hundred sixty-seven,. . .."

"b. Members so transferred. . .**shall continue to be entitled to the same rights, benefits and privileges as they were entitled to as members of the employees' retirement system**. . .." (Emphasis added.)

Section 340, subd. f. 5. RSSL, Membership of the policemen's and firemen's retirement system, states in relevant part:

If such person subsequently rejoins the retirement system within five years from the date he discontinued service with the state or a participating employer, such person **shall** be entitled to every retirement right, benefit and privilege which would have been available to him had he reentered employment on the date of such discontinuance from service. (Emphasis added.)

Section 343, subds. b. and d. RSSL, Transfer of members between systems, state in relevant part:

"b. Any member who heretofore transferred from one retirement system to another **shall**, commencing with the effective date of this act, be entitled to the same rights, privileges and benefits. . .." (Emphasis added.)

"d. Such member, thereupon, shall be given such **status** and credited with such service in the second retirement

system as he was allowed in the first retirement system." (Emphasis added.)

Section 363-b RSSL cannot be read standing alone without considering other extremely relevant provisions of the RSSL regarding Tier 1 members and vested disability retirement benefits. Counsel for Defendant-Appellees at page 18 of his brief writes, "[t]he Article 78 court actually or necessarily interpreted the state laws; decided that P&F System's rejection of plaintiff's application was based on the **exclusivity of § 363-b**. . .." Again, it is unjust and wrong, because of a legislative oversight, for the defendants to condone the disparate treatment of similarly situated troopers of the P&F system by relying solely on § 363-b RSSL without considering applicable case laws and other pertinent State and Federal laws. Further, Counsel for Defendants-Appellees in his Brief at page 6 has turned the facts around by stating:

> "On March 13, 1989, plaintiff injured his knee and lower back so badly that he sustained what he described in a verified state court petition as 'a disabling career-ending injury' which the State Comptroller **subsequently** found 'permanently incapacitated [him] from the performance of his duties' (A. 16, 51, 55, 202-03)." (Emphasis added.)

The Comptroller's determination was made on February 2, 1990 and the Article 78 Petition was dated July 22, 1991. (Appendix at pages 52a, 56a.) Also on page 6 of defense counsels brief, he states: "On January 18, 1990, plaintiff filed an application with the P&F System for an accidental disability retirement under RSSL § 363 (e). (A. 52, 200-203, 239-242)." The above statement is not an entirely accurate presentation of law and facts.

Nowhere in the entire record is it specifically cited that Appellant filed an application with P&F for Accidental Disability Retirement (ADR) pursuant to § 363 (e) RSSL. The filing of an application for ADR benefits, for members of P&F, is governed by § 363, subd. b. RSSL (not to be confused with 363-b RSSL). See **§ 363, subd. f. RSSL**. Section 363 (e) RSSL governs only the retirement allowance ("three-quarters of his final average salary") payable upon accidental disability retirement. Further, application for the above benefit was filed by counsel for the union representing troopers, on the Appellant's behalf.

The following will succinctly provide a synopsis of Plaintiff-Appellant's position on this matter that is overwhelmingly supported by cited laws and cases but which has previously been misinterpreted and/or convoluted.

REPLY TO DEFENDANTS-APPELLEES COUNTER-STATEMENT OF THE CASE REGARDING TRIGGERING DATES

Appellant first became employed by the City of Kingston, N.Y. as a Police Officer on **June 26, 1968** and simultaneously, on this date, mandatorily commenced his Tier 1 membership with P&F. (Appendix pages 62a, 248a.) **It is the above date that fixed Appellant's contractual rights to certain retirement benefits and privileges. Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York**, 940 F.2d 766 (2d Cir. 1991); **Public Employees Federation, AFL-CIO v. Mario Cuomo**, 62 N.Y.2d 450, 467 N.E.2d 236, 478 N.Y.S.2d 588 (1984) (Provision of RSSL which reduced benefits payable for state employees was unconstitutional impairment of contracts); **Birnbaum v. New York State Teachers Retirement System**, 5 N.Y.2d 1, 176 N.Y.S.2d 984, 152 N.E.2d 241 (1958)(purpose of NYS constitutional amendment was to fix the rights of the employee

at the time he became a member of the system); **Matter of Day v. Mruk,** 307 N.Y. 349, 354 (1954); **Goodman v. Regan,** 151 A.D.2d 958, 542 N.Y.S.2d 998 (1989) (employee's benefit rights were fixed when employee became member of system rather on date she began employment). Appellant was, on the above date, eligible for ADR benefits pursuant to the provisions of § 363 RSSL, if he met the criteria specified therein.

On September 11, 1969, appellant was appointed a Corrections Officer with the New York State Department of Corrections. He did, however, retain his Tier 1 status as a member of the retirement system known as the Employees' Retirement System (ERS). **§§ 40 and 43 RSSL.** Appellant was again entitled to similar ADR benefits (75% of final average salary (FAS)) pursuant to **§ 63 RSSL**, applicable to ERS members, if he met the criteria contained therein. On or about October 1970, Appellant resigned from State service.

On September 6, 1973, Appellant came from the West [California] and traveled East, upon his being appointed a Trooper with the New York State Division of State Police. **He transferred all his ERS time into P&F and retained, as permitted by state laws, all his Tier 1 membership rights, benefits and privileges,** he previously enjoyed during his membership in both the P&F and ERS Retirement Systems. See **§§ 294, 340 and 343 RSSL**; (Appendix at page 178a). However, as a result of a legislative oversight in drafting § 363-b RSSL, Appellant lost the ADR benefit portion of his Tier 1 vested retirement benefits package due to the impairing and diminishing language contained in §§ 363-b and 363-c (h) RSSL.

Appellant has, at all times relevant hereto, met the necessary qualifications and is entitled to the ADR Benefit. (Defendants-Appellees Brief at pages 2 and 15). However, Appellant was advised by all the State Police and Retirement System defen-

dants that § 363-b RSSL was the only benefit available to members who joined the Division of State Police after May 30, 1972. Appellant respectfully disagreed for the reasons and arguments more fully explained in his accompanying Brief and in this Reply Brief.

Appellant, prior to accepting the appointment with the New York State Police, made inquiries and was informed in writings, by the State Comptroller and other retirement system officials, that his prior Tier 1 status in the Retirement System remained unchanged. (Appendix at pages 192a to 196a). Appellant was further advised that he would continue to be eligible for all the same rights, benefits and privileges he previously enjoyed without being diminished or impaired. Appellee's argued that these letters were a **mistake**. (Appendix at pages 46a, 72a). **If these letters were a mistake, why then did the Appellant retain his Tier 1 P&F membership status?**

In **Bender v. Health & Hosp's,** 38 N.Y.2d 662, 668 (1976), the Court held:

> We believe that where a governmental subdivision acts or comports itself wrongfully or negligently, **including reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice, that subdivision should be estopped** from asserting a right or defense which it otherwise could have raised. (See generally, Applicability of doctrine of estoppel against government and its governmental agencies, Ann., 1 ALR2d 338; 2 Antieau, Municipal Corporations, § 16A.22; cf. **La Porto v. Village of Philmont**, 39 NY2d 7.) (Emphasis added.)

Appellant relied on these letters to his obvious detriment and in so doing he was betrayed and suffered ensuing damages. Appellees contend that Appellant voluntarily waived or "'given up his right to coverage under' RSSL 363 (A. 46)."

(Defendants-Appellees Brief at page 18). Appellant did not knowingly, expressly, or voluntarily waive or "give up" any of his contractual rights of Tier 1 membership with P&F. He, in fact, subsequently commenced litigation in the Federal courts to restore his vested retirement benefits and put an end to the conspiratorial deprivation and resulting discrimination with respect to, but not limited to, his age, sex, race, and disability.

Appellant was, at all times relevant hereto, a Tier I member of the State Retirement Systems. It is of paramount importance to this case to note that Appellant also had pursuant to **Article V, §7**, of the New York State Constitution and **U.S. Const. Art. 1, § 10, ¶ 1** (Contract Clause), a valid contractual relationship, "the benefits of which **shall not be diminished or impaired"**, [emphasis added] by virtue of his Tier 1 status with the System that continued up to his date of retirement on February 15, 1990. This "contractual relationship" entitled Appellant to § 363 RSSL ADR benefits.

Legislation such as §§ 363-b, prior to being amended, and 363-c(h) RSSL which diminish or impair the obligations of contracts is strictly scrutinized under the Contract Clause by determining whether the legislation serves a "legitimate public purpose." Defendants-Appellees have not demonstrated why they have a **"significant and legitimate public purpose"** for which the former § 363-b RSSL was intended to serve. However, courts are not deferential when the state's legislation is self-serving and impairs the obligations of its own contracts. In this situation, strict scrutiny analysis under the Contract Clause is appropriate. **Association of Surrogates and Supreme Court Reporters v. State of New York**, 940 F.2d 766, 771 (2nd Cir. 1991). Defendant-Appellees Counter-Statement of the case, Section A., The Statutory Scheme, states that "[t]he statutory trigger was the date of entry or re-entry into State Police employment. No provision for looking to the dates of other State employment, or membership in the P&F System itself, was

included." (Defendants-Appellees Brief at page 3). Section 363-b RSSL was not intended to be an all-encompassing statute. The provisions for dates of other State employment or membership in the P&F System are found elsewhere in the RSSL and fully discussed in Appellant's Brief and above. (Plaintiff-Appellants Brief at pages 13-17).

The instant appeal argues that various tribunals have rejected statutory triggers involving dates of employment subsequent to becoming a member of a retirement system because by their nature they inherently involve an impairment or diminishment of benefits based on: (1) failure to consider membership in retirement system in language of collective-bargaining agreements that result in infringing upon, diminishing or impairing State and/or Federal constitutionally protected retirement contracts and other statutory retirement laws; (2) the whims of the legislature; (3) legislative oversights; and, (4) shorter duration of employment with a particular employer rather than the usual longer duration of membership in a retirement system with its attendant vested retirement benefits. See **Public Employees Federation, AFL-CIO v. Mario Cuomo,** 62 N.Y.2d 450, 467 N.E.2d 236, 478 N.Y.S.2d 588 (1984) (Provision of RSSL which reduced benefits payable for state employees was unconstitutional impairment of contracts.) citing **Birnbaum v. New York State Teachers Retirement System,** 5 N.Y.2d 1, 176 N.Y.S.2d 984, 152 N.E.2d 241 (1958)(Purpose of NYS constitutional amendment was to fix the rights of the employee at the time he became a member of the system); **Matter of Day v. Mruk,** 307 N.Y. 349, 354 (1954); **Goodman v. Regan,** 151 A.D.2d 958, 542 N.Y.S.2d 998 (1989) (employee's benefit rights were fixed when she became member of system rather on date she began employment).

Prior to a recent legislative change, to be discussed hereinafter, § 363-b RSSL was **not** in keeping with other sections of the RSSL, State and Federal laws, and case law which found

contractual retirement benefits vesting at time of entry into the P&F Retirement System. Vesting does not occur, as Defendants argue, upon date of employment with the Division of State Police. (Plaintiff-Appellant's Brief at pages 13 through 17).

The New York State Legislature properly amended § 363-b RSSL to bring it into compliance with existing laws on this matter and to end the long-standing disparate treatment between similarly situated troopers and not otherwise enjoyed by their many other professional counterparts.

On September 17, 1997, Senate Bill No. 4439 was enacted into law as Chapter 598 of the Laws of 1997. By unanimous votes, both houses of the legislature recognized the purpose of the bill was "[t]o eliminate the current **disparity** for members of the New York State Policeman's and Fireman's retirement system who sustained injuries in the line of duty as members of the New York State Police and who have been denied Accidental Disability Retirement benefits." (NYS senate Bill No. 4439, Purpose, [emphasis added]). Section 363-b RSSL, "[p]rovide[d] for an **inequity** for certain members who were injured in the line of duty and who have been denied Accidental Disability Retirement benefits" (NYS Senate Bill No. 4439, Existing Law, [emphasis added]). The accompanying Fiscal Note to Senate Bill No. 4439 states in relevant part: "This bill would grant an officer who entered or transferred into the New York State and Local Police and Fire Retirement system prior to service in the division of state police, eligibility for the disability benefits provided by Section 362 or Section 363 of the Retirement and Social Security Law." The stated "justification" contained in the Bill Jacket of Senate Bill No. 4439 was: ". . .disability benefits were **diminished** by giving these Tier 1 members a Tier 2 benefit which was 25% less than they would have been entitled to as Tier 1 members." The new law corrects this diminution of contractually guaranteed retirement benefits ". . .by insuring that no former Tier 1 member. . .would have their pension entitle-

ment **diminished** by giving them a Tier 2 benefit [§ 363-b RSSL] due to the fact that their employment was transferred to the Division of State Police." L. 1997, c. 598, § 2 [emphasis added].

Moreover, the language now contained in § 363-b, subd. a. RSSL as a result of Senate Bill No. 4439 is similar to the wording suggested by Plaintiff-Appellant in his Brief at the bottom of page 46. The New York State Legislature has implicitly, if not expressly, recognized the validity of the Appellant's arguments by making the very amendment and changes that he requested to cure the defects in § 363-b RSSL. (Appendix at page 258a, ¶ 58).

Plaintiff-Appellant will be prepared to concede that his appeal as to the issue of constitutionality of the impairment language of §§ 363-b and 363-c (h) RSSL, in light of the recent enactment of Senate Bill No. 4439, is moot, if in fact, he were to receive his rightful ADR benefits, with all proper calculations, retroactive to his date of retirement. That has not yet occurred.

REPLY TO DEFENDANTS-APPELLEES STATEMENT REGARDING DAMAGES

The Appellant, however, still has claims asserted in his complaint for compensatory damages or back pay. These damages, whether they arise from the unconstitutional application of the statute in issue, or from the Americans With Disabilities (ADA)/Rehabilitation Act claims, or from the § 1983 claims, preclude a dismissal for mootness. If the Defendants-Appellees voluntarily cease the conduct about which the Plaintiff-Appellant is complaining, this will normally **not** be enough to make the case moot. If the Plaintiff-Appellant seeks damages, as here, the cessation will be irrelevant to the issue of mootness. See **Lawrence Tribe, *American Constitutional Law*,** at pg. 89, (Foundation Press, 2nd Ed. 1988); **City of**

Richmond v. J. A. Croson Company, 488 U.S. 469, Footnote 1, (1989); **Memphis Light, Gas and Water Division v. Craft,** 436 U.S. 1, 8-9 (1978); **Firefighters Local 1784 v. Stotts,** 467 U.S. 561, 571 (1984); **Stokes v. Village of Wurtsboro,** 818 F.2d 4 (2d Cir. 1987). The enactment of Senate Bill No. 4439 may have mitigated some of Appellant's damages but it certainly has not totally abrogated the question of damages.

The Defendants-Appellees now argue, at pages 11-12 of their Brief, that an administrative determination by the P&F Retirement System precludes all his pending federal claims: with exception to "individual capacity damages claims." (Defendants-Appellees Brief at page 18). Appellant disagrees barring the exception.

An administrative hearing on a denial of an application for retirement is provided for pursuant to § 374 RSSL. Indeed, the Appellant contended at the administrative hearings held on May 31, 1990 and May 29, 1991 that "the sole issue to be decided is whether he is entitled to apply for Accidental Disability Retirement pursuant to §§ 363 or 363-c RSSL." (Appendix at pages 17a, 37a, 55a, ¶ 17, 63a-64a, Jacoby Aff. Exhs. O, P). Section 374 RSSL also provides that the State Comptroller **shall** have exclusive authority to grant or deny disability retirement benefits. **Hassett v. Regan,** 119 A.D.2d 954; **Glaski v. Regan,** 115 A.D.2d 111. There is, however, no authority in § 374 RSSL or the regulations (NYCRR §§ 317 through 321) to award damages such as those now sought by the Appellant in this Federal Court action. Thus, a claim for damages arising under Federal Law could not properly be brought in the administrative proceeding before the Retirement System and res judicata and collateral estoppel should not apply. **Davidson v. Capuano,** 792 F.2d 275 (2d Cir. 1986); **Antonsen v. Ward,** 943 F.2d 198 (2d Cir. 1991). Following the administrative determination, Plaintiff-Appellant commenced a State Court Article 78 proceeding. Such a proceeding employs a limited scope of

judicial review, and does not afford an opportunity to litigate a § 1983 claim. **Bottini v. Sadore Management Corp.,** 764 F.2d 116 (2d Cir. 1985). The Article 78 (NY CPLR § 7801 et seq.) proceeding in NY State Supreme Court stipulated (Appendix at page 55A, ¶ 17), that "the sole issue to be decided is whether Petitioner should be granted Accidental Disability Retirement pursuant to Section 363 or, alternatively, Section 363-c of the Retirement and Social Security Law."

The Appellant's State Court proceeding was a classic, limited, Article 78 judicial review of an administrative determination. At no point did he seek compensatory damages in the form or nature which are now sought in this Federal action.

Appellant had cited, in his main brief, **Antonsen v. Ward,** 943 F.2d 198 (2d Cir. 1991), for the proposition that the primary relief sought in an Article 78 proceeding is a declaration that a state or department's actions are arbitrary and capricious. Compensatory damage claims are not identical to the narrow relief sought in an Article 78 proceeding. **Antonsen**, supra, at 204. Both **Antonsen**, supra, and **Davidson v. Capuano,** 792 F.2d 278 (2d Cir. 1986), remain the law in this circuit. In **Burgos v. Hopkins,** 14 F.3d 787 (2d Cir. 1994), this Court held that the issues to be determined in applying the principals of res judicata and collateral estoppel are whether all the issues in the instant case were brought in the Article 78 proceeding, or "whether other differences in the nature of the suit mandate that he [Plaintiff] be given a chance to prove his case." **Burgos,** supra, at 793. Appellant should be given the opportunity to amend his complaint for clarification (12(e)FRCP) and remand the matter to the District Court in order to prove his case and damages or, alternatively, reimburse him for his attorney's fees and some measure of damages for all his claims in the interest of judicial economies.

REPLY TO DEFENDANTS-APPELLEES REQUEST TO DISMISS COMPLAINT ON THEORIES OF PRECLUSION

RES JUDICATA

Appellant's claims do not fall under the New York "transactional approach" to res judicata, or claim preclusion, whereby claims that arise out of the same "factual grouping" are "deemed to be part of the same cause of action and the later claim will be barred without regard to whether it is based upon different legal theories or seeks different or additional relief." **Davidson v. Capuano,** 792 F.2d 275 (2d Cir. 1986) citing **Smith v. Russell Sage College,** 54 N.Y.2d 185, 192-93, 429 N.E.2d 746,749 (1981); **Bates v. Department of Corrections,** 774 F.Supp. 536 (E.D.Wis. 1991); **Carino v. Town of Deerfield,** 750 F.Supp. 1156, 1162 (N.D.N.Y. 1990). One of the limitations, however, is that claim preclusion is not a bar to subsequent §1983 litigation where a damage claim could not have been asserted in the first forum. **Lawrence v. McGuire,** 651 F.Supp 312, 318; **Carino,** supra. at 1163.

In the prior New York State Article 78 proceeding, Appellant sought relief under the New York State Retirement and Social Security Law. Here, the Appellant, for the first time, seeks redress for the abrogation of his constitutional rights and seeks money damages under 42 U.S.C. §§ 1981, 1983, 1985, 1988, 1991 and other laws. (Appendix at pages 9a-10a, ¶ 1; pages 249a-250a, ¶ 1). The compensatory damages sought herein were not incidental to the primary relief sought in the Article 78 proceeding. Like similar damage claims in civil rights actions, allowing such a claim for non-economic damages in an Article 78 proceeding would be "an impermissible intrusion" into such proceedings. **Antonsen v. Ward,** 943 F.2d 198, 204 (2d Cir. 1991). Thus, this same Second Circuit Court of Appeals of New York has held with respect to Article 78 proceedings, that a §1983 claim will not be barred "if the initial forum did not have

the power to award the full measure of relief sought in the later litigation." **Davidson v. Capuano,** 792 F.2d 275, 278 (Second Cir. 1986) citing **Heimbach v. Chu,** 744 F.2d 11, 14 (2d Cir. 1984) cert. denied 470 U.S. 1984, 105 S.Ct. 1842, 85 L.Ed.2d 141 (1985).

State and Federal Courts, in applying New York State Law, have consistently held that Civil Rights claims for monetary damages cannot be maintained in a New York State Article 78 proceeding and, therefore, a subsequent Federal claim for damages is not barred by the determination arising out of an Article 78 proceeding. See **Burgos,** supra, at 793; **Schwab v. Bowen,** 41 N.Y.2d 907, 908 (1977); **Murphy v. Capone,** 191 A.D.2d 683 (1993); **Reape v. Adduci,** 151 A.D.2d 290 (1989); **Leisner v. Bahou,** 97 A.D.2d 860 (1993) Appeal dismissed 61 N.Y.2d 985, Certiorari denied, 469 U.S. 1087).

Thus, Appellant's Federal Civil Rights and damage claims are not precluded by res judicata or collateral estoppel based on the prior Article 78 court not having the power to award the full measure of relief sought, nor was the same issue raised or decided there that precluded him from proceeding forward with his claims.

COLLATERAL ESTOPPEL

The applicability of issue preclusion to a federal suit depends on the issues actually litigated in the New York State Supreme Court Article 78 proceeding. 28 U.S.C. 1738 provides the guiding light: the state law of preclusion determines whether the issue may be relitigated, so long as the federal court defendant had a full and fair opportunity to litigate the federal issue in the state court proceeding. **Benjamin v. Coughlin**, 905 F.2d 571 (2d Cir. 1990); **Negin v. City of Mentar**, 601 F.Supp. 1502 (1985). Appellant's sole issue decided in the State Court proceeding was: "[W]hether Petitioner should be granted

Accidental Disability Retirement pursuant to Section 363 or alternatively, Section 363-c of the Retirement and Social Security Law." (Appendix page 55a). Preclusive effect has been denied where the scope of judicial review was so narrow as to deny a meaningful opportunity to be heard on the merits, (**Bottini v. Sadore Management**, 764 F.2d 116 (2d Cir. 1985); Accord **Lum V. Honolulu**, 728 F.Supp. 1452 (1989)), and where the federal court plaintiff could not assert the federal claim in the judicial review proceeding. See e.g. **Hill v. Coca-Cola Bottling Co.**, 786 F.2d 550 (2d Cir. 1986); **Davidson v. Capuano**, supra.

In the Appellant's Article 78 proceeding, he did not specifically raise any State or Federal Constitutional claims to be decided on the merits. Appellant contends that his Federal Constitutional claim (and other claims) was grossly misapprehended by the District Court below in that it was not identical to but different from the State Constitutional provision explained above. Moreover, a mere passing mention, without more, of a constitutional claim, does not mean that such an issue was necessarily raised and decided in State Court. **Fay v. South Colonie Central School District,** 802 F.2d 21 (2d Cir. 1986) citing **Gramatan Home Investors Corp. v. Lopez,** 46 N.Y.2d 481 (1979). "Improperly seeking to deny a litigant two days in court, courts must be careful not to deprive him of one." **Fay,** supra, at 29. (Quote marks in citation omitted).

The District Court denied the Appellant's request to amend his complaint. Leave should have been granted so as to remedy any pleading defect by providing a more definite statement. **12(e) FRCP.**

Disability discriminations cannot be litigated in New York State under an Article 78 proceeding. Thus, Appellant is not collaterally estopped, since the civil rights claims in the present action were not raised or necessarily decided in the prior state

action. **D'Arata v. New York Central Mutual Fire Insurance Company,** 76 N.Y.2d 659, 664, 564 N.E. 2d 634 (1990).

REPLY TO DEFENDANTS-APPELLEES REQUEST TO DISMISS COMPLAINT ON STATUTE OF LIMITATIONS GROUNDS

The Appellant alleges, in paragraphs 7 and 8 of the Complaint, (Appendix at page 11A) that the unlawful activities and unlawful conduct on the part of the Defendants are "continuing." Among the continuing wrongs are the on-going breach of his contractual relationship which, on a monthly basis, divests him of disability retirement compensation benefits which he would otherwise be receiving. (Appendix at page 14a, ¶¶ 20 and 21). In addition, Appellant alleges that he was not provided with a reasonable accommodation for his disability pursuant to the provisions of the Americans With Disabilities Act (ADA) and/or the Rehabilitation Act (Appendix at page 24a, ¶¶ 69, 70) although other similarly situated, male and female, troopers were granted such accommodations. (Appendix at pages 14a-15a, ¶¶ 25 through 29). As a result of the failure to provide a reasonable accommodation, the state police retired the Appellant by filing a § 363-b RSSL retirement application on his behalf. (Appendix at pages 16a-17a, ¶¶ 37 through 39; pages 23a-24a, ¶¶ 62 through 71; pages 257a through 260a, ¶¶ 45, 48 through 49, 52 through 61, 65).

The Appellant further alleges, in his amended complaint, that he was denied a reasonable accommodation for his injury and resulting disability and was subsequently retired. (Appendix at pages 258a and 259a, ¶¶ 52 through 61). Appellant further alleges that he had not exhausted his administrative remedies with regard to the disability discrimination claims until October 11, 1995. (Appendix at page 259a, ¶ 61). Appellant alleges in his 12th, 13th, and 14th causes of actions of his Amended Complaint that the discrimination against him continues to date,

preventing him from earning his full salary and promotion potential. (Appendix at pages 264a through 266a).

The United States Supreme Court in **Burnett v. Grattan**, 468 U.S. 42, 55 (1984), held that state limitations periods from administrative employment discrimination statutes are inappropriate for § 1985(3) cases. In simple terms, the Appellant claims that the New York State Police do not make provisions for "light duty." This illegal per se policy was in place at the time of Appellant's forced retirement and continues to date. Thus, the violations of the Appellant's rights are serial, because they keep happening, and systemic. A systemic violation "has its roots in a discriminatory policy or practice." So long as the policy or practice continues into the limitations period, a challenger may be deemed to have filed a timely complaint even though his initial "harm" may have occurred at an earlier date. **Jensen v. Frank**, 912 F.2d 517, 522-523 (1st Circuit); **John v. Rodriguez**, 943 F.2d 104 (1st Cir. 1991).

Continuing violations are not a new and novel rule or theory of law as defense counsel attempts to argue. (Defendants-Appellees Brief at page 20). As the Sixth Circuit held in **Hall v. Cuyahoga Valley Board of Education**, 926 F.2d 505, 511 (6th Cir. 1991):

> "There are important policy reasons not to require that a discrimination suit be filed at the first instance of discrimination or not at all. To do so, would frustrate the broad remedial purposes of the Civil Rights Law which encourage the eradication of discrimination."

The Tenth and Seventh Circuits have also stated:

> A continuing violation generally arises in the context of unconstitutional employment discrimination. It is usually based on a showing that an employer continues to imple-

ment an illegal system or policy, such as race discrimination . . . . If employment decisions made under that policy result in constitutional violations within the limitations period, a continuing violation may be shown. A suit challenging systemic policy is not barred even though the policy began before the limitations period, because the policy itself continues to violate employees' rights. . .. **Pike v. City of Mission**, 731 F.2d 655, 660 (10th Cir. 1984). Judge Posner explained that the only justification for treating a series of separate violations as a single continuing violation is that **"it would have been unreasonable to require plaintiff to sue on each one."** **Malhorta v. Cotter Co.**, 885 F.2d 1305, 1310 (7th Cir. 1989). (Emphasis added.)

Appellee's subjected Miszko to a continuing course of harassment and discrimination by reason of Miszko's disability, including but not limited to, his age, race, and sex. The discrimination and discriminatory policies by all the Defendants-Appellees still continues to date. Despite Appellant having excellent performance ratings, he was denied reasonable accommodations for work or promotions. He was advised by a representative and counsel for the union representing the troopers that the Americans with Disabilities Act or Rehabilitation Act does not apply to troopers because the State Police do not have any "light duty" or other accommodations. Appellant suffered and continues to suffer the damaging effects of such discrimination, misinformation, and continuing delays, and in his health care treatment and benefits under the New York Workers' Compensation/SIF System.

REPLY TO DEFENDANTS-APPELLEES REQUEST TO DISMISS COMPLAINT BASED ON ELEVENTH AMENDMENT IMMUNITY

If the State of New York and its officials are shielded by the Eleventh Amendment to the U.S. Constitution or qualified immunity, then how can the Appellant, or anyone, ever prevail in a disability discrimination or other action?

Appellant contends that in his Amended Complaint and supporting papers he overcame the immunity issue under three alternatives (1) enforcement of disability discrimination claims pursuant to 42 U.S.C. §1983, (2) showing that Appellant's money damages will not be forthcoming from the State Treasury, and (3) Title VII action abrogating the State's 11th Amendment immunity. (Plaintiff-Appellant's Brief at pages 34, 43; Appendix at pages 250a-251a, ¶¶ 1, 5; page 277a.)

The Eleventh Amendment immunity to which a state official is entitled in a Section 1983 suit depends upon the capacity in which the person is sued. In their individual and personal capacities, "[i]f the act to which the state Attorney General seeks to enforce be a violation of the Federal Constitution....", Appellee's can be stripped of their "official and representative character and is subjected in his person to the consequences of his individual conduct." **Ex Parte Young,** 209 U.S. 123, 157 (1908). Appellee's are indispensable parties in this action and, in the instant case, the monies would not necessarily come from the state treasury. This action seeks monetary relief against the Defendants-Appellees, who receive federal financial assistance, both in their official and individual and personal capacities. Since an award of money damages would not necessarily require payment from the state treasury, there is no Eleventh Amendment immunity. **Fay v. South Colonie Central School District,** 802 F.2d 21 (2nd Cir. 1986); **Association of Surrogates and Supreme Court Reporters Within the City of New**

York v. State of New York, 940 F.2d 766 (2nd Cir. 1991) (Eleventh Amendment did not bar restoration of withheld monies to affected state employees after State's "lag-payroll" law was declared unconstitutional as impairing State's contractual obligations.)

Appellee's Eleventh Amendment immunity defense can also be estopped pursuant to the arguments made in **Gierlinger v. New York State Police, et al,** 1992 WL 106279 (W.D.N.Y.) In **Gierlinger**, "the plaintiff identified the constitutional right she claims was interfered with - to wit, her right under the equal protection clause of the Fourteenth Amendment to be free from sexual harassment." Appellant's aforementioned constitutionally protected rights were similarly interfered with and Defendants-Appellee's 12(b)(1)and 12(b)(6), FRCP, summary judgment motion to dismiss should be reversed. ("If,. . .matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. . .as provided in Rule 56,. . .." **Rule 12(b)(6) FRCP.)**

Since appellant's disability retirement from the New York State Police, the Appellee's, including The State Insurance Fund (SIF) (carrier) for the New York Workers' Compensation System, Pecoroni, and other unnamed agents, have denied Appellant reasonable accommodations for his disabilities (including being struck by a consultant during a routine medical examination), reasonably necessary medical care and treatment of his disabilities and for his out of pocket reasonably necessary medical expenses; notwithstanding Appellee's granting reasonable accommodations to other disabled members. All these actions by Defendants-Appellees are intolerable and contrary to the laws cited herein and in Plaintiff-Appellant's Brief having been made and provided for individuals in Appellant's position.

CONCLUSION

By reason of all the aforementioned, the Judgment of the District Court respectfully requires reversal and the Appellant is entitled to the relief claimed including attorney fees, interest, and other costs and disbursements that to this Court may seem just and proper.

Dated February 27, 1998 at:
Poughkeepsie, New York

Respectfully submitted,

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APPENDIX D

Appendix D — Brief for Plaintiff-Appellant, Michael Miszko, Jr., U.S. Court of Appeals; 2nd Circuit of New York, Docket No. 96-7963

96-7963

United States Court of Appeals

For the Second Circuit

MICHAEL MISZKO, JR.,

Plaintiff-Appellant,

against

ATTORNEY GENERAL OF THE STATE OF NEW YORK; NEW YORK STATE POLICE; JAMES W. McMAHON, Superintendent of the New York State Police; THOMAS A. CONSTANTINE, former Superintendent of the New York State Police; NEW YORK STATE POLICEMEN'S AND FIREMAN'S RETIREMENT SYSTEM; H. CARL McCALL, Comptroller; EDWARD V. REGAN, former Comptroller,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal is taken as of right pursuant to 28 U.S.C. 1291 and the Federal Rules of Appellate Procedure, Rules 3 and 4(a), from a district court judgment granting summary judgment motion dismissing plaintiff's complaint pursuant to Rules 12(b)(1) and 12(b)(6)of the Federal Rules of Civil Procedure and 42 U.S.C. §§1981, 1983, 1985, 1988 and 1991.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the judgment of the U.S. District Court in summarily dismissing Appellant's Federal Constitutional claims based on a prior decision in New York State Supreme Court with respect to State Constitutional claims constitutes reversible error? .....

1. Whether Appellant's Constitutional claim that §§363-b and 363-c(h) of the N.Y.S. Retirement and Social Security Law violates the Contracts Clause of Article 1, Section 10, of the U.S. Constitution, was properly barred by collateral estoppel? .....

B. Whether the District Court properly dismissed Appellant's disability discrimination claims under the Americans With Disabilities Act (ADA) without considering his Rehabilitation Act claim that comprises the core conduct of his 42 U.S.C.§1983 claim? .....

1. Whether Appellant, as a former member of the New York State Police, has a claim of disability discrimination arising under the Americans With Disabilities Act and/or the Rehabilitation Act or are the Acts inapplicable to members of the State Police? .....

2. Whether the Appellee's are entitled to immunity pursuant to the Eleventh Amendment of the United States Constitution? .....

3. Whether Appellant's disability discrimination claims also arise pursuant to 42 U.S.C. §1983? .....

C. Did the District Court misapprehend the facts relevant to the statute of limitations periods for Appellant's Civil Rights, Constitutional, and disability claims that arise from on-going serial and systemic continuing violations?.....

STATEMENT OF THE CASE

NATURE OF THE CASE

This is a civil case pursuant to 42 U.S.C. §1983 seeking monetary damages and affirmative relief from Appellee's in their individual and official capacities secured to Appellant by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the U.S. Constitution; §504 of the Rehabilitation Act of 1973, 29 U.S.C., §794 *et seq.*; the Americans with Disabilities Act (ADA), 42 U.S.C., §12101 *et seq.* the Age Discrimination In Employment Act (ADEA), 29 U.S.C., §623 *et seq.* and other laws; judgment declaring §§363-b and 363-c(h) of the New York State Retirement and Social Security Law unconstitutional. This Appeal is from a final judgment of the Southern District Court of New York dated July 1, 1996 which disposed of all claims and the Appellant taking due notice thereof and governing himself accordingly. This Circuit Court of Appeals, therefore, now has jurisdiction to hear this Appeal that was timely filed on August 2, 1996 pursuant to F.R.A.P., Rules 3 and 4(a).

COURSE OF PROCEEDINGS

This action was commenced on February 16, 1995 with the filing and service of a Summons and Complaint after plaintiff timely filed a complaint with the U.S. Equal Employment Opportunity Commission. On May 7, 1996, a Pre-trial Conference was held before Judge Rakoff. On June 12, 1996, plaintiff filed cross motion to amend complaint and for class action status. On June 14, 1996, defendants filed Motion to Dismiss pursuant to FRCP Rules 12(b)(1) and 12(b)(6).

Oral arguments were heard on June 19, 1996 and Memorandum and Order was signed by Judge Rakoff on July 3, 1996 dismissing the Complaint in it entirety and denying leave to amend the Complaint. Judgment for defendants entered July 1, 1996. Notice of Appeal filed August 2, 1996 by Appellant.

DISPOSITION IN THE DISTRICT COURT

The Honorable Jed S. Rakoff, U.S.D.J. of the Southern District Court in White Plains, New York dismissed the Complaint in its entirety and denied leave to file an amended Complaint by Memorandum and Order dated July 3, 1996.

Accordingly, for the reasons set forth in said Memorandum and Order, Appendixed at pages 330a-334a, the Court directed the entering of a Judgment, Appendixed at page 329a, in favor of the defendants and dated July 1, 1996.

FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Appellant first became employed by the City of Kingston, N.Y. as a Police Officer on June 26, 1968 and simultaneously commenced his Tier 1 membership with the State Retirement

System on that same date. (Appendix pages 62a, 248a.) It is this date that fixed Appellant's contractual rights to certain retirement benefits and privileges.

On September 11, 1969, appellant was appointed a Corrections Officer with the New York State Department of Corrections and retained his Tier 1 status as a member of said Retirement System. On September 6, 1973, appellant was appointed a Trooper with the New York State Police, retaining all his Tier 1 membership rights, benefits and privileges, with the same retirement system, as permitted by state laws.

Appellant, prior to accepting the appointment with the New York State Police, made inquiries and was informed in writings, by the State Comptroller and other retirement system officials, that his prior Tier 1 status in the Retirement System remained unchanged. Appellant was further advised that he would continue to be eligible for all the same rights, benefits and privileges he previously enjoyed without being diminished or impaired. Given the above assurances by the Retirement System, Appellant accepted the appointment with the New York State Police. Appellee's argued that these letters were a **mistake**. Appellant disagreed.

Appellant was, at all times relevant hereto, a Tier I member of the State Retirement System with an original effective entry date into that system of June 26, 1968. He had pursuant to Article V, §7, of the New York State Constitution, a valid contractual relationship with the System that continued up to his date of retirement on February 15, 1990. This contract entitled Miszko to an accidental disability benefit of 75% of his final average salary upon being retired due to accidental disability pursuant to §363, of the New York Retirement and Social Security Law (RSSL).

On October 13, 1984, Appellant incurred an on-the-job accidental injury to his right knee. As a result of said injury and disability, Appellant was forced to take sick leave from work. When he returned to work, Appellant was given an assignment in the nature of desk duty in the Communications Section as an accommodation for his disability.

In February of 1989, Appellant was involuntarily transferred back to road patrol, even while he continued to request and require accommodation for his disability, and while other similarly situated Troopers, who were not disabled, were allowed to remain stationed in the Communications Section of Troop Headquarters for periods exceeding eight years, until they eventually retired.

Appellant, Miszko, filed a grievance with his supervisors protesting the involuntary transfer and requested that he be returned back to the Communications Section. Appellant was the second most senior member in the Communications Section and the next eligible for the supervisory position (Technical Sergeant) in that section. This grievance has not been answered to date.

Appellee's subjected Miszko to a continuing course of harassment and discrimination by reason of Miszko's disability and the discrimination still continues to date. Despite Appellant having excellent performance ratings, he was denied reasonable accommodations for work or promotions, was advised that the Americans with Disabilities Act or Rehabilitation Act does not apply to troopers because the State Police do not have any light duty or other accommodations. Appellant suffered and continues to suffer the effects of such discrimination, misinformation, and continuing delays, by not only the aforementioned Appellee's but by the union representing the troopers, and in his health care treatment and benefits under the New York Workers'

Compensation System, and by the new statute (Section 363-b, RSSL) described hereinafter.

As a result of Appellee's discrimination, Miszko suffered extreme emotional distress resulting in anxiety attacks, nausea and vomiting, severe headaches, depression, cold chills, muscle cramps and spasms, sweats and nervousness, for which he continues treatments.

On March 13, 1989 Appellant was again accidently injured on the job, reinjuring his knee and injuring his lower back, resulting from a high speed pursuit and altercations with a persistent felony drunk driver. (Appendix page 54a, Record on Appeal, page 12). These injuries necessitated his being out on disability for approximately one year. On or about January 15, 1990, Appellant learned that Appellee's Anton and Constantine filed an application to retire him on December 12, 1989 under §363-b, RSSL, (the 50% retirement plan), despite his numerous requests to return to work. Appellee's Anton and Constantine refused to file a separate and distinct §363, RSSL application (the 75% retirement plan) to retire Appellant on accidental disability, despite his NYS Constitutional rights, despite his Tier 1 status with the Retirement System, and despite Appellee's conceding that Appellant incurred a permanent accidental disability. This action has resulted in the loss of approximately $10,000 in benefits per year, to Miszko, a loss which continues to date, and will continue into the future.

Appellant, Miszko, is a 50 year old white male who has been determined by the Appellee's and others to be permanently disabled. Although Appellant is disabled and over 40, he was capable of performing his job in the Communications Section as a State Trooper with reasonable accommodation, despite his age, race and disability. Appellee's State of New York, State Police, Anton and Constantine, denied Appellant said reason-

able accommodations and opportunities for promotions and forced him to retire.

On January 18, 1990, Appellant filed an application for accidental disability pursuant to §363, RSSL, (75% plan) but Appellee's Regan, McManaman, and Fremont, wrongfully denied such benefits only six days later on January 24, 1990, claiming that Appellant is only eligible for the lesser benefits under §363-b, RSSL (50% plan). In May of 1991, Appellant filed an application for performance of duty disability pursuant to §363-c of the RSSL to invoke the §363 RSSL, accidental disability provision, but the Appellee Retirement System officials again wrongfully denied said application on or about September of 1993 based on §363-c(h) RSSL.

On April 1, 1971, pursuant to L.1971, c. 684, §§24 and 31, the New York State legislature enacted §363-b of the RSSL as a result of an agreement reached between the Civil Service Employees Association (CSEA) and the Commissioned Officers of the Division of State Police. Troopers were not included in this initial negotiating or legislative session. However, as a result of the disparate and unequal treatment as applied between the Officers and Troopers in the implementation of the new statute, the legislature amended §363-b of the RSSL and L.1971, c. 684, §24, on May 30, 1972, pursuant to L.1972, c. 635, §7, to include Troopers in the 50% State Police Disability plan. Similarly, the disparate treatment, as applied, between Officers and Troopers who were members of the same Retirement System during the above time periods is still continuing today for some Troopers, such as Appellant, who became members of the same Retirement System prior to May 30, 1972.

Appellant requested of several state officials including the Governor, Appellee's State Police, the legislature, and the New York State Comptroller, to legislatively amend §363-b, RSSL, to end the disparate treatment received by pre-1972 members of

the Retirement System such as Miszko. The aforesaid request was never followed through and §§363-b and 363-c(h) RSSL, as applied, still continue to discriminate against Appellant and others similarly situated.

Since appellant's disability retirement from the New York State Police, the Appellee's, including the insurance carrier for the State of New York under the Workers' Compensation System, The State Insurance Fund (SIF) and Pecoroni, have denied appellant reasonable accommodations for his disabilities, reasonably necessary medical care and treatment of his disabilities and for his out of pocket reasonably necessary medical expenses; notwithstanding appellee's granting similar considerations to other disabled members. All contrary to the laws cited herein having been made and provided for disabled individuals in Appellant's position.

SUMMARY OF ARGUMENT

Generally, legislation which impairs the obligations of private contracts is tested under the contract clause by reference to a rational basis test; that is, whether the legislation is a "reasonable" means to a "legitimate public purpose." However, courts are not deferential when the state's legislation is self-serving and impairs the obligations of its own contracts. In this situation, a more searching analysis under the contract clause is appropriate. *Association of Surrogates and Supreme Court Reporters v. State of New York*, 940 F.2d 766, 771 (2nd Cir. 1991). In almost every case, this Court has held a governmental unit to its contractual obligations when it enters financial or other markets. The contract clause, if it is to mean anything, must prohibit New York from dishonoring its existing contractual obligations when other policy alternatives are available. This principle has been with us almost as long as our Constitutional Law. *Association of Surrogates and Supreme Court*

Reporters v. State of New York, supra. at 774. See also *Condell v. Bress*, 983 F.2d 415 (2nd Cir. 1993).

Under the Federal Rules, pleading is not a game of skill where possibly one stumble by Appellant's counsel will decide the outcome. The accepted purpose of pleading is to facilitate a proper decision on the merits. **F.R.C.P., Rules 8(a)(2)(f), 12(c, e, f), 15, 16, 26-37, 56, 28 U.S.C.A.** The Federal Rules of Civil Procedure do not require the Plaintiff to set forth the facts in exact detail in order to base his claim. All that the Rules require is "a short and plain statement of the claim" **(F.R.C.P., Rule 8(a)(2))** so as to provide the defendant(s) fair notice of Appellant's claims and grounds upon which they are based.

Further, summary judgment should not have been granted by the District Court unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Gallo v. Prudential Residential Services, Limited Partnership*, 22 F.3d 1219 (2d Cir. 1994).

Appellant's claims that §§363-b and 363-c(h) RSSL are unconstitutional as they violate Article 1, §10 of the U.S. Constitution, are not barred under res judicata, collateral estoppel or any other theory of preclusion.

Appellant's Federal Civil Rights and damage claims would not be precluded by res judicata because the prior Article 78 court did not have the power to award the full measure of relief sought, nor was the same issue raised or decided in that court precluding him from proceeding forward with his claims under the doctrine of collateral estoppel.

The District Court below erred by not considering Appellant's Rehabilitation Act claim pursuant to **§504 of the Rehabilitation Act of 1973 (Rehab Act), 29 U.S.C. §794,** ***et seq.***

The District Court denied the Appellant's request to amend his complaint. Leave should have been granted so as to remedy any pleading defect by providing a more definite statement.

It is alleged by the Appellee's that the ADA does not apply to members of the Division of State Police. They further claim to have no "light duty" positions and it is pure speculation as to whether they have any positions officially designated as a "reasonable accommodation", either under the ADA or the Rehab Act.

Appellant made numerous requests for accommodations. He grieved his involuntary transfer in order to return to the Communications Section, he applied to take the Sergeant's examination but was never given notice of where and when to report while on sick leave.

If the State of New York and its officials are shielded by the Eleventh Amendment to the U.S. Constitution or qualified immunity, then how can the Appellant, or other similarly situated State Troopers, ever prevail in an ADA or other disability discrimination action?

In the instant case, the monies would not come from the state treasury. This action seeks monetary relief against the New York State and Local Police and Fire Retirement System.

Thus, in the absence of evidence of Congressional intent to the contrary, Appellant asserts that §504 of the Rehabilitation Act does not preclude an action pursuant to 42 U.S.C. Section 1983 based on handicap discrimination.

In Appellant's case, his claim is not time-barred since the accrual of his claim or continuing violations of an unconstitutional law (§363-b RSSL) are still occurring, not continuing violations in the past.

The only justification for treating a series of separate violations as a single continuing violation is that **"it would have been unreasonable to require plaintiff to sue on each one."**

ARGUMENT

A. Whether the judgment of the U.S. District Court in summarily dismissing Appellant's Federal Constitutional claims based on a prior decision in New York State Supreme Court with respect to State Constitutional claims constitutes reversible error?

Appellant will first address that portion of the District Court's judgment granting Appellee's summary judgment motion to dismiss as it pertains to Federal Rules of Civil Procedure, Rules 12(b)(1) and 12(b)(6), respectively, claiming lack of jurisdiction and for failure to state a claim for which relief may be granted, and the attached Appendix for all claims set forth by Appellant. Said summary judgment motion to dismiss should not have been granted and requires reversal.

This most Honorable Circuit Court assuredly has jurisdiction of Appellant's federal constitutional claim of Nonimpairment of Obligations of Contracts pursuant to **Article I, § 10, ¶ 1, U.S. Constitution** which states in pertinent part the following:

> "No state shall. . . pass any. . . Law impairing the Obligation of Contracts . . .."

Appellant alleges that his "contract" entitling him to specific accidental disability retirement benefits was created on his date

of membership in the New York State Policemen's and Firemen's Retirement System (P & F) as of June 26, 1968, and, based on **Article V, Section 7, New York State Constitution,** which states:

> "After July first, nineteen hundred forty, membership in the pension or Retirement System of the state or of a civil division thereof shall be a **contractual relationship,** the benefits of which shall not be diminished or impaired." (Emphasis added) (McKinney's Const. Art. V, §7)

See also *Condell v. Bress*, 983 F.2d 415 (1993); *McDermott v. Regan*, 82 N.Y.2d 354, 604 N.Y.S.2d 890 (1993); *McDermott v. Cuomo*, 1992 WL 133900 (N.D.N.Y. 1992); *Castellano v. Bd. of Trustees*, 937 F.2d 752 (2nd Cir. 1991); *Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York*, 940 F.2d 766 (2nd Cir. 1991) ("If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."); *Public Employees Federation, AFL-CIO v. Mario Cuomo*, 62 N.Y.2D 450 (1984); *Kivo v. Levitt*, 67 A.D.2d 464, 416 N.Y.S.2d 333, affirmed 50 N.Y.2d 1017, 431 N.Y.S.2d 684, 409 N.E.2d 1359 (1979); *Weber v. Levitt*, 41 A.D.2d 452, 344 N.Y.S. 2d 381, affirmed 34 N.Y.2d 797, 359 N.Y.S.2d 39, 316 N.E.2d 327 (1973).

Generally, legislation which impairs the obligations of private contracts is tested under the contract clause by reference to a rational basis test; that is, whether the legislation is a "reasonable" means to a "legitimate public purpose." However, courts are not deferential when the state's legislation is self-serving and impairs the obligations of its own contracts. In this situation, a more searching analysis under the contract clause is appropriate. *Association of Surrogates and Supreme Court Reporters v. State of New York*, 940 F.2d 766, 771 (2nd Cir.

1991). When a state itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, this Court has held a governmental unit to its contractual obligations when it enters financial or other markets. The contract clause, if it is to mean anything, must prohibit New York from dishonoring its existing contractual obligations when other policy alternatives are available. This principle has been with us almost as long as our Constitutional Law. *Association of Surrogates and Supreme Court Reporters v. State of New York*, *supra.* at 774. See also *Condell v. Bress*, 983 F.2d 415 (2nd Cir. 1993).

Retirement plans are within reach of the Contracts Clause. *Pennie v. Reis*, 132 U.S. 464, 471 (1989). "The constitutional amendment, as demonstrated above, prohibits official action during a public employment membership in a retirement system which adversely affects the amount of the retirement benefits payable to the members on retirement under laws and conditions existing at the time of his entrance into retirement system membership. . .. That reward or benefit is part of the compensation which he accepts in lieu of the greater rewards of private employment." *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y.2d 1, 176 N.Y.S.2d 984, 152 N.E.2d 241 (1958). In the private sector there may be some dispute as to when contractually enforceable rights accrue under certain retirement plans. In the case of a public employee, however, the above state constitutional provision and case law makes it clear that, "[t]he purpose of the [constitutional] amendment was to fix the rights of the employee at the time he became a member of the system." *Public Employees Federation, AFL-CIO v. Mario Cuomo*, 62 N.Y.2d 450, 467 N.E.2d 236, 478 N.Y.S.2d 588 (1984) citing *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y.2d 1, 176 N.Y.S.2d 984, 152 N.E.2d 241 (1958); *Matter of Day v. Mruk*, 307 N.Y. 349, 354 (1954); *Goodman v. Regan*, 151 A.D.2d 958, 542 N.Y.S.2d 998 (1989) (employee's

benefit rights were fixed when employee became member of system rather on date she began employment).

Appellant further alleges that his Tier 1 vested accidental disability pension contract rights (75% of final average salary pursuant to **§363 RSSL**) were unconstitutionally diminished when replaced with substantially less benefits (50% of final average salary) pursuant to **§ 363-b RSSL** upon his retirement. This 50% benefit is customarily afforded Tier 2 members of the Division of State Police who joined the Retirement System at a later date (after July 1, 1973) than Appellant.

The above federal constitutional provision/claim is not identical to the state constitutional provision. The above cited State constitutional provision defines retirement benefits as a non-diminishing contractual relationship. The above cited Federal Constitutional claim bars state laws, such as §§363-b and 363-c(h), RSSL, that were enacted subsequent to Appellant's membership in the P&F retirement system, from diminishing or impairing, the obligations of Appellant's contractual relationship under §363 RSSL.

Appellant's federal constitutional claim was not raised as an issue in the prior New York State Supreme Court, Article 78, proceeding; nor, is it similar to the state constitutional provision cited in support of the issue raised in the State Court. In Appellant's State Article 78 proceeding, his Petition stated, **"[t]he sole issue to be decided is whether Petitioner should be granted Accidental Disability Retirement pursuant to Section 363 or, alternatively, Section 363-c of the Retirement and Social Security Law."** (See Appendix page 55a, Petition, ¶17.) Generally, the "[p]arty seeking benefit of collateral estoppel must prove that identical issue was necessarily decided in prior action and is decisive in present action, and party to be precluded from relitigating issue must have had full and fair opportunity to contest prior determination." *D'Arata v. New*

York Central Mutual Fire Insurance Company, 76 N.Y.2d 659, 564 N.E.2d 634, 563 N.Y.S.2d 24 (1990).

Appellant's federal constitutional claim pursuant to **Article I, § 10, ¶ 1, U.S. Constitution** is not identical to the above State Constitutional provision and was not raised as an issue to be decided on the merits in the prior state court Article 78 proceeding. Therefore, the District Court erred requiring reversal of the judgment of the District Court.

Moreover, "for 'a question to have been actually litigated' so as to satisfy the identity requirement, it 'must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding.'" *D'Arata, Id. at 24. (citing Matter of Halyalkar v. Board of Regents*, 72 N.Y.2d 261, 268, 527 N.E.2d 1222 (1988); **Restatement (Second) of Judgments § 27, comments d, e.)** That was not the situation in the instant case.

The U.S. Supreme Court, and various Circuit Courts, in appraising the sufficiency of a complaint has put forth the accepted rule that Appellant's complaint should **not** be dismissed for failure to state a claim unless it appears **beyond doubt** that the Appellant can prove no set of facts in support of his claims which would entitle him to relief. **F.R.C.P., Rule 12, 28 U.S.C.A.** See also, *Conley et al v. Gibson et al*, 355 U.S. 41 (1957) citing *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Leimer v. State Mutual Life Asur. Co.*, 108 F.2d 302 (8th Cir. 1940); *Dioguardi v. Durning*, 139 F.2d 774 (2nd Cir. 1944); and, *Continental Collieries v. Shober*, 130 F.2d 631 (3rd Cir. 1942).

Appellant's case is fact intensive and this may possibly be a reason why defense counsel filed a motion to dismiss so early in

these and other similar proceedings. This case requires further review and development before being summarily decided upon.

Appellant, whether in the State Courts or in this Federal forum has always been denied the opportunity to proceed to trial to have his issues fully and fairly litigated or decided on the merits. This injustice by the State Courts and the U.S. District Court requires closer scrutiny beyond mere complaint and motion submissions.

Under the Federal Rules, pleading is not a game of skill where possibly one stumble by Appellant's counsel will decide the outcome. The accepted purpose of pleading is to facilitate a proper decision on the merits. **F.R.C.P., Rules 8(a)(2)(f), 12(c, e, f), 15, 16, 26-37, 56, 28 U.S.C.A.** The Federal Rules of Civil Procedure do not require the Plaintiff to set forth the facts in exact detail in order to base his claim. All that the Rules require is "a short and plain statement of the claim" **(F.R.C.P., Rule 8(a)(2))** so as to provide the defendant(s) fair notice of Appellant's claims and grounds upon which they are based. This simplified form of "notice pleading" is permitted and accepted because of the numerous opportunities for discovery and other pretrial procedures established by the Rules to state precisely the basis of claims and defenses and to fine-tune the disputed facts and issues. See **F.R.C.P., Rule 12(e)** (motion for a more definite statement); **Rule 12(f)** (motion to strike portions of the pleading); **Rule 15** (right to amend); **Rule 16** (pre-trial procedure and formulation of issues); **Rules 26 thru 37** (depositions and discovery); **Rule 56** (motion for summary judgment). Moreover, **F.R.C.P., Rule 8(f)** states, "[a]ll pleadings shall be so construed as to do substantial justice." Not the contrary, as in this case.

Further, summary judgment should not have been granted by the District Court unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Gallo v. Prudential Residential Services, Limited Partnership*, 22 F.3d 1219 (2d Cir. 1994); see generally *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *United States v. Diebold*, Inc, 369 U.S. 654, 655 (1962).

The Circuit Court reviews a District Court's grant of summary judgment de novo. *Gallo, supra*, at 1223. In assessing the record to determine whether there is a genuine issue to be tried as to any material fact, the "court is required to resolve all ambiguities and draw all factual inferences in favor of party against whom summary judgment is sought", in this case, in favor of the Appellant. **F.R.C.P., Rule 56(c);** *Chambers v. TRM Copy Centers Corporation*, 43 F.3d 29 (2d Cir. 1994); *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). It is respectfully submitted that it cannot be found beyond doubt that the Appellant cannot prove any set of facts in support of his claims which would entitle him to relief. *Conley et al v. Gibson et al*, 355 U.S. 41, 45-46 (1957). Appellant's Amended Complaint and supporting papers provide sufficient "notice pleading" to move forward.

The District Court below erred in granting Appellee's summary judgment motion to dismiss by summarily resolving all issues in the instant case. In dealing with summary judgment motions, "[i]ts duty, in short, is confined at this point to issue-finding, it does not extend to issue-resolution." *Gallo v. Prudential Residential Services, Limited Partnership*, 22 F.3d 1219 (2d Cir. 1994). "[A] court 'cannot try issues of fact; it can only determine whether there are issues to be tried.' " *Chambers v. TRM Copy Centers Corporation*, 43 F.3d 29 (2d Cir. 1994) citing *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54, 58 (2d Cir. 1987).

Therefore, Appellant asserts that his Amended Complaint and supporting papers adequately sets forth genuine issues of material facts, **beyond a doubt**, in support of his claims for which relief may be granted and gave the Appellee's fair notice of the basis for each claim. The District Court improperly resolved disputed issues of fact and inappropriately drew fact inferences in favor of the Appellee's and did not credit all of the inferences that could be drawn in favor of the Appellant.

The District Court denied Appellant's request for leave to amend his complaint. Leave should have been granted so as to remedy any pleading defect by providing a more definite statement of the Appellant's claims **(F.R.C.P. Rules 12(e) and 15(a))**and move forward to the trier of fact as the final arbiter of substantial justice.

The choice of labels should not be permitted to distort **substance**, especially where the consequence would be so drastic as to deprive this Appellant of the opportunity to be heard. *Criales v. American Airlines, Inc.*, 105 F.3d 93 (2d Cir. 1997).

1. Whether Appellant's Constitutional claim that §§363-b and 363-c(h) of the N.Y.S. Retirement and Social Security Law violates the Contracts Clause of Article 1, Section 10, U.S. Constitution, was properly barred by collateral estoppel?[1]

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[1] Briefly, the crucial wording of §363-b, RSSL, ***". . .last entered or reentered service in the division prior to May thirtieth, nineteen hundred seventy-two. . ."***, when read alone, renders its application unconstitutional by effectively precluding a person who entered the Retirement System prior to May 30, 1972 from being eligible for the §363, RSSL, benefit.

Section 363-b, RSSL, cannot be read standing alone. It must be read in conjunction with other provisions of the RSSL, case law,

As set forth herein and more fully developed in Appellant's Memorandum of Law, submitted to the District Court below, and appendixed herein at pages 272a, 282a-288a, Appellant's claims that §§363-b and 363-c(h) RSSL are unconstitutional as they violate Article 1, §10 of the U.S. Constitution, are not barred under res judicata, collateral estoppel or any other theory of preclusion.

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the New York State and Federal Constitutions.

Section 318, sub. a., RSSL, Guaranty; states in pertinent part:
"The **latest employers** of the different members shall be obligated for: . . . The payment of all pensions, annuities, retirement allowances, refunds and any other benefits . . .."

Sections 294 and 340, RSSL, respectively, state in pertinent part as follows:

"Members so transferred ***shall*** continue . . . to be entitled to the same rights, benefits and privileges as they were entitled to . . ." (emphasis added.)

"If such person subsequently rejoins the retirement system within five years from the date he discontinued service with the state . . . such person ***shall*** be entitled to every retirement right, benefit and privilege which would have been available to him had he reentered employment on the date of such discontinuance from service." (emphasis added.)

Section 343, RSSL, also states in pertinent part:
"Any member who heretofore transferred from one retirement system to another ***shall***, . . . be entitled to the same rights, privileges and benefits, and shall be subject to the same obligations, as a transferee who hereafter transfers . . .. Such member, thereupon, ***shall*** be given such ***status*** and credited with such service in the second retirement system as he was allowed in the first retirement system." (emphasis added.)

With respect to Appellee's summary judgment motion to dismiss, all allegations in the Complaint must now be assumed to be true and given effect most favorable to the Appellant. Given this, it is clear that the Appellant has made out valid causes of action that have not been fully and completely developed previously in order to warrant preclusion herein.

The language of §363-b, RSSL, therefore abrogates the guarantees of the other statutes and the State Constitution and should not therefor be given preclusive effect.

"Collateral estoppel is grounded on concepts of fairness and should not be rigidly or mechanically applied." *D'Arata v. New York Central Mutual Fire Insurance Company*, 563 N.Y.S.2d 24, 563 N.E.2d 634 (1990); *Matter of Halyalkar v. Board of Regents*, 72 N.Y.2d 261, 268, 527 N.E.2d 1222 (1988). (This area of law will be more fully briefed below.)

The Hon. Jed S. Rakoff, U.S.D.J., of the Federal District Court of White Plains, N.Y. decided on July 3, 1996 that Appellant was precluded from relitigating those portions of his case that were challenged in State Supreme Court Pursuant to Article 78 of the New York CPLR 7801 et seq and now barred under the doctrines of res judicata and collateral estoppel. Respectfully, Judge Rakoff's decision is contradictory to law, the State Court record (Appendix, pages 45a-203a-1), case law, and constitutes reversible error.

RES JUDICATA

Under the doctrine of res judicata, or claim preclusion, a prior judgment on the merits between the parties bars subsequent litigation of claims which could have been raised in the prior proceeding. *Lawrence v. Mc Guire*, 651 F.Supp 312, 316 (S.D.N.Y. 1987).

Appellant's claims do not fall under the New York "transactional approach" to res judicata whereby claims that arise out of the same "factual grouping" are "deemed to be part of the same cause of action and the later claim will be barred without regard to whether it is based upon different legal theories or seeks different or additional relief." *Davidson v. Capuano*, 792 F.2d 275 (2d Cir. 1986) citing *Smith v. Russel Sage College*, 54 N.Y.2d 185, 192-93, 429 N.E.2d 746,749 (1981); *Bates v. Department of Corrections*, 774 F.Supp. 536 (E.D.Wis. 1991); *Carino v. Town of Deerfield*, 750 F.Supp. 1156, 1162 (N.D.N.Y. 1990). One of the limitations, however, is that claim preclusion is not a bar to subsequent §1983 litigation where a damage claim could not have been asserted in the first forum. *Lawrence, supra.* at 318; *Carino, supra.* at 1163.

In *Lawrence*, the Board of Trustees of the Police Pension Fund denied the Appellant's application for certain disability benefits. The Appellant thereafter commenced an Article 78 proceeding challenging the determination and requesting reconsideration in compliance with his due process rights. The Supreme Court dismissed his petition, and the Appellate Division affirmed. In determining that Appellant's subsequent §1983 action was not precluded by res judicata, the District Court noted that damages can generally not be recovered in an Article 78 proceeding, and, consequently, that Appellant's damage claims could not have been asserted in the first forum.

In the prior New York State Article 78 proceeding, Miszko sought relief under the New York State Retirement and Social Security Law. Here, the Appellant, for the first time, seeks redress for the abrogation of his constitutional rights and seeks money damages under 42 U.S.C. § 1983. The compensatory damages sought herein were not incidental to the primary relief sought in the Article 78 proceeding. Like similar damage claims in civil rights actions, allowing such a claim for non-economic

damages in an Article 78 proceeding would be "an impermissible intrusion" into such proceedings. *Antonsen v. Ward*, 943 F.2d 198, 204 (2d Cir. 1991). Moreover, in *Migra v. Warren City School District*, 465 U.S. 75 (1984), the United States Supreme Court held that the preclusive effect of a State court judgment must be determined by application of State law. *Migra, supra*, at 88. Thus, this same Second Circuit Court of Appeals of New York has held with respect to Article 78 proceedings, that a §1983 claim will not be barred "if the initial forum did not have the power to award the full measure of relief sought in the later litigation." *Davidson v. Capuano*, 792 F.2d 275, 278 (Second Cir. 1986) citing *Heimbach v. Chu*, 744 F.2d 11, 14 (2d Cir. 1984) cert. denied 470 U.S. 1984, 105 S.Ct. 1842, 85 L.Ed.2d 141 (1985). Further, "[w]here 'formal barriers' to asserting a claim existed in the first forum it would be 'unfair to preclude [the Appellant] from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.' " *Davidson v. Capuano,* 792 F.2d 275, 278 (2d Cir. 1986); **Restatement (Second) of Judgments § 26(1)(c) comment c (1982).** This same holding was reaffirmed by the Second Circuit in the case of *Antonsen v. Ward*, 943 F.2d 198 (2d Cir. 1991).

Both State and Federal Courts, in applying New York State Law, have consistently held that Civil Rights claims for monetary damages cannot be maintained in a New York State Article 78 proceeding and, therefore, a subsequent Federal claim for damages is not barred by a determination arising out of an Article 78 proceeding. See *Schwab v. Bowen*, 41 N.Y.2d 907, 908 (1977); *Murphy v. Capone*, 191 A.D.2d 683 (1993); *Reape v. Adduci*, 151 A.D.2d 290 (1989); *Leisner v. Bahou,* 97 A.D.2d 860 (1993) Appeal dismissed 61 N.Y.2d 985, Certiorari denied, 469 U.S. 1087).

A recent case from a New York Appellate Court with respect to this issue is that *Liu v. New York City Police Department*, 216

A.D.2d 67 (1995). In *Liu*, the Appellate Division, First Department held:

> Res Judicata does not bar plaintiff from litigating his State and Federal Civil Rights claims in which he alleges that the revocation of his pistol licenses was discriminatorily based upon his Chinese national origin and deprived him of his constitutional rights. Although these claims were not raised in the prior CPLR Article 78 proceeding challenging the revocation (citation omitted), damages for Civil Rights violations are not 'incidental to the primary relief sought' [CPLR 7806; *Davidson v. Capuano*, 792 F.2d 275 (2d Cir. 1986), and thus, the Article 78 Court 'did not have the power to award the full measure of the [relief] sought' (Supra, at 278, see also, *Fay V. South Colonie Central School District*, 802 F.2d 21, 29; *Matter of Rosario v. Blum*, 80 A.D.2d 511, 512-513). Nor is Plaintiff collaterally estopped since the Civil Rights claim in the present action were not raised or necessarily decided in the prior action. See, *D'Arata v. New York Central Mutual Fire Insurance Company*, 76 N.Y.2d 659, 664.

The judgment in Liu's State Supreme Court Article 78 proceeding merely held that the resolution did not violate the Civil Service Law of the State of New York. The issues of Civil Rights violations or damages were not raised or decided in that Article 78 proceeding, nor could they have been under the New York State Law. Therefore, there was no collateral estoppel as a result of that prior determination.

Thus, Appellant's Federal Civil Rights and damage claims would not be precluded by res judicata because the prior Article 78 court did not have the power to award the full measure of relief sought, nor was the same issue raised or decided in that

court precluding him from proceeding forward with his claims under the doctrine of collateral estoppel.

COLLATERAL ESTOPPEL

The general rule is that collateral estoppel, or issue preclusion, bars the relitigation of issues which were actually litigated and determined in the prior suit and necessary to the judgment entered in that suit, so long as the party against whom the doctrine is invoked had a full and fair opportunity to litigate the issues in the previous action. **See** *Lawrence, supra.*

Thus, the applicability of issue preclusion to a federal suit depends on the issues actually litigated in the New York State Supreme Court Article 78 proceeding. Appellant's sole issue to be decided in the State Court proceeding was: **"[W]hether Petitioner should be granted Accidental Disability Retirement pursuant to Section 363 or alternatively, Section 363-c of the Retirement and Social Security Law."** (Appendix page 55a, Petition, ¶17.)

A mere passing reference to State constitutional provisions is insufficient to preclude litigation of the issues in a subsequent suit on the basis of collateral estoppel; the discussion of the issues sought to be precluded must have been accompanied by "elaborations or citations of authority." *Montagna v. O'Hagan,* 402 F.Supp. 178, 182 (E.D.N.Y. 1975).

Thus, it appears from the Article 78 Petition (Appendixed at pages 49a-56a) that a full and fair opportunity to litigate the claims in the instant case was not afforded Miszko and mere passing references to other Constitutional issues were not accompanied by significant "elaborations or citations of authority", including of the court, to warrant preclusive effect or that they were necessarily decided on the merits. "In short, the courts will not permit a party to elevate **form over**

substance...", to avoid an otherwise valid constitutional claim. *Hirschfeld Productions, Inc. v. Edwin Mirvish*, 218 A.D.2d 567, 630 N.Y.S.2d 726 (1995).

The Full Faith and Credit Act, 28 U.S.C. § 1738 provides in relevant part:

> "The . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States. . . as they have by law or usage in the courts of such State . . .."

Under this provision, the preclusive effect that a federal court must give to a state court judgment is determined by reference to the state law of preclusion. Section 1738 mandates that a federal court give a state court judgment the same preclusive effect it would receive under the law of the state, *Migra v. Warren City School District*, 465 U.S. 75 (1984) neither more nor less; *Parsons Steel v. First Ala. Bank*, 474 US 518, 523 (1986). This principle applies to both defensive and offensive preclusion. *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990). 28 U.S.C. 1738 provides the guiding light: the state law of preclusion determines whether the issue may be relitigated, so long as the federal court defendant had a full and fair opportunity to litigate the federal issue in the state court proceeding. *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990); *Negin v. City of Mentar*, 601 F.Supp. 1502 (1985).

Preclusive effect has been denied where the scope of judicial review was so narrow as to deny a meaningful opportunity to be heard on the merits, *Bottini v. Sadore Management*, 764 F.2d 116 (2d Cir. 1985). Accord *Lum V. Honolulu*, 728 F.Supp. 1452 (1989), and where the federal court plaintiff could not assert the federal claim in the judicial review proceeding. See e.g. *Hill v. Coca-Cola Bottling Co.*, 786 F.2d 550 (2d Cir. 1986); *Davidson v. Capuano, supra.*

In the Appellant's Article 78 proceeding, he did not specifically raise any State or Federal Constitutional claims to be decided on the merits. Appellant contends that his Federal Constitutional claim was grossly misapprehended by the District Court below in that it was not identical to but different from the State Constitutional provision as explained above. Moreover, a mere passing mention, without more, of a constitutional claim, does not mean that such an issue was necessarily raised and decided in State Court. *Fay v. South Colonie Central School District*, 802 F.2d 21 (2d Cir. 1986) citing *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481 (1979). Here, as in *Fay*, *supra*, the doctrine of collateral estoppel is inapplicable to this case because the language of the decision in the Article 78 proceeding (Appendix, at pages 45a-46a.) was so vague as to render it impossible to conclude that a resolution of substantial issue was necessary to reach the decision to dismiss the case. *Fay*, *supra*, at 30. This Court, therefore, should not give preclusive effect to the substance of Miszko's claims.

As the Court further noted in *Fay v. South Colonie Central School District, supra,* at 29, "Improperly seeking to deny a litigant two days in court, courts must be careful not to deprive him of one." (Quotation marks in citation omitted).

The District Court denied the Appellant's request to amend his complaint. Leave should have been granted so as to remedy any pleading defect by providing a more definite statement.

Lastly, disability discriminations cannot be litigated in New York State under an Article 78 proceeding. They are governed by the provisions of Section 298 of the Executive Law, which requires full plenary action. Thus, Appellant is not collaterally estopped, since the civil rights claims in the present action were not raised or necessarily decided in the prior state action.

D'Arata v. New York Central Mutual Fire Insurance Company, 76 N.Y.2d 659, 664, 564 N.E. 2d 634 (1990).

B. Whether the District Court properly dismissed Appellant's disability discrimination claims under the Americans With Disabilities Act (ADA) without considering his Rehabilitation Act claim that comprises the core conduct of his 42 U.S.C.§ 1983 claim?

The District Court below erred by not considering Appellant's Rehabilitation Act claim pursuant to **§504 of the Rehabilitation Act of 1973 (Rehab Act),** 29 U.S.C. §794, *et seq.* Appellant also asserted an ADA claim pursuant to 42 U.S.C. §12101, *et seq.* However, that latter claim was dismissed as it did not apply retroactively. Appellant did, however, make a claim for prospective relief to remedy a continuing wrong that was overlooked by the District Court. (Appendix, page 273a.) Certainly the Rehabilitation Act claim applies to Appellant during his employment with the Division of State Police on September 6, 1973 and continued until his forced disability retirement on February 15, 1990. The Rehabilitation Act issue was not addressed or decided on the merits by the District Court. Appellant's disability discrimination claims under the ADA and the Rehabilitation Act were not properly considered and is contrary to applicable case law and the above statutes, discussed below, and dismissal by the District Court now requires reversal.

1. Whether Appellant, as a former member of the New York State Police, has a claim of disability discrimination arising under the Americans With Disabilities Act and/or the Rehabilitation Act or are the Acts inapplicable to members of the State Police?

Appellant's contention is on point with this Circuit Court's decision in *Stone v. City of Mount Vernon*, 1997 WL 359183 (2nd Cir. (N.Y.)), that "[t]he regulatory schemes of the ADA and

the Rehabilitation Act are similar. . .. The terms common to both regulatory schemes are to be interpreted in the same way." See, e.g., 29 U.S.C. §794(d) (Rehabilitation Act is to be interpreted in accordance with the standards applied under the ADA); *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1515 (2d Cir. 1995); *Staron v. McDonald's Corp.*, 51 F.3d 353, 355-56 (2d Cir. 1995).

Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA) also contain provisions similar to the ADA. See 42 U.S.C. §2000e(b), 2000e-2(a); 29 U.S.C. §623(a)(1) and 630(b). Title VII and ADEA cases are useful in construing the pertinent provisions of the ADA. See *Janopoulos v. Harvey L. Walner & Associates, Ltd.*, 835 F.Supp. 459, 462 (N.D. Ill. 1993). Other courts have held that state entities can be liable under Title VII and the ADEA for enforcing statutes or regulations affecting employee compensation or benefits. See *EEOC v. City of Evanston*, 854 F.Supp. 534, 537-38 (N.D.Ill. 1994); *United States v. State of Illinois*, 1994 WL 562180 (N.D.Ill. 1994); *EEOC v. State of Illinois*, 1990 WL 56147 (C.D.Ill. 1990). This Circuit Court has jurisdiction in Appellant's claim against the State, defined as an employer under the ADA, that affects Appellant's compensation or terms, conditions, or privileges of employment. *Evanston*, *supra*. at 537-38.

This Honorable Court in *Rothschild v.Grottenthaler*, 907 F.2d 286 (2d Cir. 1990) stated: "In this Circuit it is settled that a private right of action against recipients of federal financial assistance may be implied from §504." *Marlow v. Dep't of Education*, 820 F.2d 581, 583 (2d Cir. 1987); *U.S. v. Univ. Hospital*, 729 F.2d 144,154 (1984).

Appellant, in his Amended Complaint and supporting papers, established a prima facie case under both of the above ADA and Rehabilitation Act statutes by asserting that Appellee's were

recipients of federal financial assistance and (1) that he is an individual who has a disability within the meaning of either statute, (2) that an employer covered by either statute had notice of his disability, (3) that with reasonable accommodation, he could perform the essential functions of the position sought, and (4) that the employer has refused to make such accommodations. (See Appendix at pages 272a-274a citing the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) standard to establish a prima facie case of discrimination and related cases.) The District Court failed to consider the entitlement to relief under the Rehabilitation Act.

Appellant further alleges that the discriminatory acts complained of are continuing to date and would have involved "little or no monetary cost" from Appellant's reassignment to the Communications Section, and his "productivity in such position would [have] benefit[ed] not only society, but the Department itself as well." (Matter in brackets omitted in original text.) *Stone, supra.*

It is alleged by the Appellee's that the ADA does not apply to members of the Division of State Police. They further claim to have no "light duty" positions and it is pure speculation as to whether they have any positions officially designated as a "reasonable accommodation", either under the ADA or the Rehab Act. This was certainly the case during Appellant's tenure of employment with the Division of State Police notwithstanding the "constructive light duty" position Appellant had in the Communications Section after his first on-duty injury.

The words "light duty" and "reasonable accommodation" are "relational terms" that, when applied, essentially mean the same thing. Therefore, if the State Police claim they do not have "light duty" positions, are they also saying they have no "reasonable accommodations?"

Appellant is not saying that employers should create "light duty" positions. Appellant is simply saying that there are positions or sections within the Division of State Police that are tantamount to light duty or an accommodation such as Communications, Records, Identification, Evidence, Academy, Public Information, Division Counsel, etc. that are always undermanned and could use additional personnel for periods of time. An "accommodation" under the ADA or the ADEA refers to specific action by the employer that enables a disabled individual to work. Further, ADA regulations require an "interactive process" between the employer and employee to reach a reasonable accommodation, and a party that obstructs that process does not act in good faith. *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 14 A.D.D. 904 (7th Cir. 1996)

In *Beck*, *supra,* a secretary with osteoarthritis, depression, and other multiple medical conditions requested a "reasonable accommodation" for her disabilities. The University was not sure as to how to accommodate her but did give her a wrist rest, less work, and arranged for meetings to obtain more information about dealing with her disabilities. She did not respond. When Beck was asked what accommodations she required, she argued the employer should have known what to do.

Unlike *Beck*, Appellant made numerous requests for accommodations. He grieved his involuntary transfer in order to return to the Communications Section, he applied to take the Sergeant's examination but was never given notice of where and when to report while on sick leave, he applied for technical positions, investigative positions, and other "constructive reasonable accommodation" positions. All requests were denied, the grievance was never answered, and Appellant was eventually retired. At the time, Appellant may have been able to assume the above positions pursuant to the Rehab Act, or other laws, but was never given an opportunity. Appellant simply fell through

bureaucratic chasms and as a further result of the Appellee's Eleventh Amendment immunity arguments proffered, this inquiry now begs a more important question:

2. Whether the Appellee's are entitled to immunity pursuant to the Eleventh Amendment of the United States Constitu tion?

If the State of New York and its officials are shielded by the Eleventh Amendment to the U.S. Constitution or qualified immunity, then how can the Appellant, or other similarly situated State Troopers, ever prevail in an ADA or other disability discrimination action? Municipalities below the level of State government do not enjoy Eleventh Amendment immunity.

Appellant contends that in his Amended Complaint and supporting papers he overcame the immunity issue under two alternatives (1) enforcement of disability discrimination claims pursuant to 42 U.S.C. §1983, and (2) showing that Appellant's money damages will not be forthcoming from the State Treasury. See Appendix pages 276a-277a.)

The Eleventh Amendment of the Constitution bars suits against the state in federal court unless that state has consented to the litigation. Actions against state officials are also barred where the relief granted would bind the state or where the state is the real party in interest. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).

The Eleventh Amendment immunity to which a state official is entitled in a Section 1983 suit depends upon the capacity in which the person is sued. In their individual and personal capacities, "[i]f the act to which the state Attorney General seeks to enforce be a violation of the Federal Constitution....", Appellee's can be stripped of their "official and representative

character and is subjected in his person to the consequences of his individual conduct." *Ex Parte Young*, 209 U.S. 123, 157 (1908). Appellee's are indispensable parties in this action and, in an official capacity suit seeking money damages against a state official, the state is deemed to be the real party in interest where an award of damages would be paid from the state treasury. *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 115 S.Ct. 394, 404-405, 130 L.Ed.2d 245 (1994).

In the instant case, the monies would not come solely from the state treasury. This action seeks monetary relief against the New York State Local Police and Fire Retirement System and its members.

The retirement system for public employees in New York State resulted from a report of the New York State Commission on pensions issued in 1920, which recommended establishment of retirement systems and that the management of the funds of the system be vested with the state comptroller. *McDermott v. Regan*, 82 N.Y.2d 354, 604 N.Y.S.2d 890 (1993). There was subsequently created a separate retirement system for police and fireman known as the New York State and Local Police and Fire and Retirement System (P&F). (Retirement and Social Security Law, Section 310, amended 1987). All of the funds invested and all of the cash and securities and other properties of the system are held in the name of such system which "shall have the powers and privileges of a corporation." (Retirement and Social Security Law, Section 310). The comptroller of the State of New York has authority over these funds as trustee of said benefits. *Scaglione v. Levitt*, 37 N.Y.2d 507, 337 N.E.2d 592, 375 N.Y.S.2d 79 (1975); *McDermott v. Regan, supra.* Thus, any award of monetary damages sought by the Appellant in this case would not come from the New York State treasury, but rather from the separate funds held in the name of the corporation known as the New York State and Local Police and Fire Retirement System. Since an award of money damages would

not require payment from the state treasury, there is no Eleventh Amendment immunity. *Fay v. South Colonie Central School District*, 802 F.2d 21 (2nd Cir. 1986); *Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York*, 940 F.2d 766 (2nd Cir. 1991) (Eleventh Amendment did not bar restoration of withheld monies to affected state employees after State's "lag-payroll" law was declared unconstitutional as impairing State's contractual obligations.)

To the extent that the Appellant seeks injunctive relief against enforcement of the statute as to his retirement claims, the Eleventh Amendment does not bar a suit for prospective injunctive relief from unconstitutional actions by state officials. *Pennhurst, supra*, at 102-103; *Edelman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974); *Papasan v. Allain*, 478 U.S. 265, 276-278, 106 S.Ct. 2932, 2939-2940). Appellant made such a claim in the District Court that was ignored. Appendix at pages 276a-277a.

Appellee's Eleventh Amendment immunity defense can also be estopped pursuant to the arguments made in *Gierlinger v. New York State Police, et al*, 1992 WL 106279 (W.D.N.Y.) In *Gierlinger*, "the plaintiff identified the constitutional right she claims was interfered with - to wit, her right under the equal protection clause of the Fourteenth Amendment to be free from sexual harassment." The Court denied defendants motion for summary judgment by "resolving all ambiguities and drawing all factual inferences in favor of the non-moving party" according to the *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) standard for making out a prima facie case of discrimination. Similarly, Appellant's aforementioned constitutionally protected rights were interfered with and Appellee's motion to dismiss should be reversed.

3. Whether Appellant's claims of disability discrimination also arise pursuant to 42 U.S.C. § 1983?

Appellant had the ability to seek administrative relief under both the ADA and the Rehabilitation Act. Many federal courts have held that a private individual may sustain an action under the Rehabilitation Act without exhausting administrative remedies. *Pushkin v. Regents of the University of Colorado,* 658 F.2d 1372, 1382 (10th Cir. 1981); *Camenisch v. University of Texas*, 616 F.2d 127, 136 (5th Cir. 1980), judgment vacated on other grounds 541 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981); *Rothschild v. Grottenthaler*, 716 F.Supp. 796, 801 (S.D.N.Y. 1989).

Beyond the statutory remedies and any private right of action that may exist pursuant to them, it is respectfully submitted that this Appellant may also seek relief under 42 U.S.C. Section 1983 on the basis of discrimination arising from his disability. As the Court noted in *Rothschild v. Grottenthaler*, *Id.* at 801: "we think it clear that 'Section 504 [is] not so comprehensive as to '[leave] no room for additional private remedies under Section 1983.'" (citing *Conlon v. City of Long Beach*, 676 F.Supp. 1289, 1298 (E.D.N.Y. 1987) quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 49 U.S. 418, 107 S.Ct. 766, 771, 93 L.Ed.2d 781 (1987)). Thus, in the absence of evidence of Congressional intent to the contrary, Appellant asserts that §504 of the Rehabilitation Act does not preclude an action pursuant to 42 U.S.C. Section 1983 based on handicap discrimination.

As the Supreme Court has repeatedly held, "Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). The Second Circuit has held that an employment discrimination plaintiff alleging the violation of a constitutional right may bring suit under Section 1983 alone and is not

required to plead concurrently a violation of Title VII. *Annis v. County of Westchester*, 36 F.3d 251 (2nd Cir. 1994). In *Annis*, the Court reiterated the holding of the U.S. Supreme Court in *Davis v. Passman*, 442 U.S. 228, 234-235, 99 S.Ct. 2254, 2271-72, 60 L.Ed.2d 846 (1979) that individuals have a constitutional right under the Equal Protection clause to be free from sex discrimination in public employment. Similarly, age discrimination may serve as a basis for a Section 1983 equal protection claim. *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991); *Spain v. Ball,* 928 F2d 61 (2nd Cir. 1991). Likewise, the elimination of a job classification based upon sex, age, and union activities has been found to state a valid Section 1983 equal protection claim. *DeLoreto v. Ment*, 944 F.Supp. 1023 (S.D.Conn. 1996). Entitlement to a disability retirement is a constitutionally protected property interest for purposes of §1983. *Russell v. Dunston*, 896 F.2d 664, at 668, (2nd Cir. 1990). Municipal employee retirement benefits are constitutionally protected property. *Winston v. City of New York*, 759 F.2d 242, 247-249 (2nd Cir. 1985); *Basciano v. Herkimer*, 605 F.2d 605, 609, (2nd Cir. 1978) cert. denied 442 U.S. 929, 99 S.Ct. 2858, 61 L.Ed.2d 296 (1979).

C. Did the District Court misapprehend the facts relevant to the statute of limitations periods for Appellant's Civil Rights, Constitutional, and disability claims that arise from on-going serial and systemic continuing violations?

As mentioned above, the denial of Appellant's retirement benefits in violation of Constitutional mandates would be an appropriate subject of this action pursuant to 42 U.S.C. §1983 based on serial and systemic on-going continuing violations. A "serial" violation is deemed to be "continuing" because it keeps happening. A "systemic" violation has roots in a discriminatory policy or practice and if continued into the limitations period, Appellant is deemed to have filed a timely complaint.

A §1983 claim "accrues when the plaintiff 'knew or had reason to know' of the injury which is the basis of [his or] her claim." *Aronson v. New York City Employees Retirement System*, 757 F.Supp. 226, 228 (S.D.N.Y. 1991), affd. 940 F.2d 649 (2d Cir. 1991). In Appellant's case, his claim is not barred since the accrual of his claim or continuing violations of an unconstitutional law (§363-b RSSL) are still occurring, not continuing violations in the past.

Because of the on-going nature of the discrimination alleged, and the *Burke v. Sugarman*, 35 N.Y.2d 39, 315 N.E.2d 772, 358 N.Y.S.2d 715 (1974) analysis, "...failure to comply with constitutional requirements...is a continuing and constitutional wrong", provides a sound basis for dismissing a statute of limitations defense. See also *Cash v. Bates*, 301 N.Y. 258, 261, 93 N.E.2d 835, 836 (1950).

The Fifth Circuit stated that "[t]o establish a continuing violation..., the plaintiff must establish that the unconstitutional or illegal act was a part of 'standard operating procedure,' a fixed and continuing practice." *Perez v. Laredo Junior College*, 706 F.2d 731, 733 (5th Cir. 1983).

The Tenth Circuit stated:

> A continuing violation generally arises in the context of unconstitutional employment discrimination. It is usually based on a showing that an employer continues to implement an illegal system or policy, such as race discrimination . . . . If employment decisions made under that policy result in constitutional violations within the limitations period, a continuing violation may be shown. A suit challenging systemic policy is not barred even though the policy began before the limitations period, because the policy itself continues to violate employees' rights. . .. *Pike v. City of Mission*, 731 F.2d 655, 660 (10th Cir.

1984). Judge Posner explained that the only justification for treating a series of separate violations as a single continuing violation is that **"it would have been unreasonable to require plaintiff to sue on each one."** *Malhorta v. Cotter Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989). (Emphasis added.)

In *Chardon v. Fumero Soto*, 462 U.S. 650 (1983) the Supreme Court ruled that, like tolling §1988 requires that tolling effect be determined by reference to state law, so long as the state law is not inconsistent with the policies of §1983.

The Fifth Circuit found that "federal courts possess the power to use equitable principles to fashion their own tolling provisions in exceptional situations in which state statutes of limitations eradicate rights or frustrate policies created by federal law." *Rodriguez v. Holmes*, 963 F.2d 799, 805 (5th Cir. 1992).

In *Cepeda v. Coughlin*, 785 F.Supp. 385 (S.D.N.Y. 1992) the state court's dismissal of the Article 78 proceeding on statute of limitations grounds did not operate to preclude litigation of the merits of the §1983 action.

The Court in the *Application of DELUCA*, 125 N.Y.S.2d 766, 282 A.D. 607 (1953) dealt with the issue of statute of limitations as it applied to appointments and promotions within the State Police based on competitive examinations pursuant to State Constitutional law. The Court held, "[t]here may be read into it [petition] a charge of continuing failure on the part of the respondent to obey a constitutional mandate and hence the limitations cited do not apply." Citing *Cash v. Bates, supra.* at page 261.

Appellant's case is similar by virtue of the fact that §363-b RSSL, in its present form, is vague and overbroad and, as applied, still continues to treat him differently with each passing

day than other similarly situated members of the Retirement System. Appellant has recommended to the Appellee's that the words "membership in the P&F Retirement System or service in the division prior to May 30, 1972", or wording similar to that, be added to the current language of §363-b RSSL. His requests were ignored.

The statute of limitations governing §1983 actions is not provided by federal law. In the absence of such a provision, "the courts will generally apply the statute of limitations for the most analogous state action, as long as the state law does not conflict with federal law or policy." *Okure v. Owens*, 625 F.Supp. 1568, 1569 (N.D.N.Y. 1986), affd. 816 F.2d 45 (2d Cir. 1987), affd. 488 U.S. 235 (1989) (citations omitted).

Unlike in *Okure*, *supra,* where the Court held that the "most analogous state action" was one for general personal injuries under N.Y. CPLR §214(5). In this case we are talking about a Federal Constitutional, Obligation of Contracts, claim. It would therefore seem "most analogous" to apply the six year statute of limitations period for contract obligations pursuant to New York CPLR §213(2).

Section 213(2) states in pertinent part:

> "The following actions must be commenced within six years: (2) an action upon a contractual obligation or liability, express or implied. . .," (NY McKINNEYS, §213(2))

Each day brings a new date of harm for the Appellant when he "endorses under protest" his §363-b RSSL retirement allowance. Therefore, based on the above arguments made herein, the statute of limitations issue is now moot.

Appellant does not feel the above law will conflict with federal laws or policies. If anything, it would aid in the implementation of the aforementioned laws and bring a just and equitable solution to a dilemma that has plagued the Appellant and many other New York State Troopers who have fallen prey to the deleterious effects of §363-b and 363-c(h) RSSL.

CONCLUSION

By reason of all the aforementioned, the Judgment of the District Court respectfully requires reversal and the Appellant is entitled to the relief claimed including attorney fees, interest, and other costs and disbursements that to this Court may seem just and proper.

Dated July 20, 1997 at:
Poughkeepsie, New York

Respectfully submitted,

THOMAS P. HALLEY, ESQ..
Attorney for Plaintiff-Appellant
297 Mill Street
Poughkeepsie, NY 12601
(914) 452-9120

APPENDIX E

E-1
Appendix E — Excerpts of U.S. Court of Appeals, 2nd Circuit of New York, Miszko v. Attorney General of The State of New York et al, Docket No. 96-7963

1a
Docket Entries (Pages 1a-6a)

APPEAL CLOSED

U.S. District Court
Southern District of New York — Civil Database (White Plains)

CIVIL DOCKET FOR CASE # 95-CV-1111

Miszko v. Attorney Gen'l NYS, et al — Filed: 02/16/95
Assigned to: Judge Jed S. Rakoff — Jury demand: Plaintiff
Demand: $0,000 — Nature of Suit: 790
Lead Docket: None — Judisdiction: Federal Question
Dkt# in other court: None

Cause: 42:1983 Civil Rights (Employment Discrimination)

Michael Miszko, Jr.
plaintiff

Carolyn Corn Bichoupan
[term 09/19/95]
[COR LD NTC]
Leeds & Morelli, Esqs.
One Old Country Road
Carle Place, NY 11514
USA
(516) 873-9550

v.

ATTORNEY GENERAL OF NEW YORK STATE

Stephen M. Jacoby
[COR LD NTC]

defendant	Dennis C. Vacco, Atty General for the State of NY 120 Broadway New York, NY 10271 212-416-8635
NEW YORK STATE POLICE defendant	Stephen M. Jacoby (see above) [COR LD NTC]
JAMES W. MCMAHON Superintendent of the New York State Police defendant	Stephen M. Jacoby (See above) [COR LD NTC]
THOMAS A. CONSTATINE, former Superintendent of the New York State Police defendant	Stephen M. Jacoby (See above) [COR LD NTC]

Proceedings include all events. APPEAL
7:95cv1111 Miszko v. Attorney Gen'l NYS, et al CLOSED

2/16/95	1	COMPLAINT filed; Summons issued and Notice pursuant ot 28 U.S.C. 636(c); FILING FEE $120.00 RECEIPT # 232996 (kz) [Entry date 02/24/95]
2/16/95	–	It is suggested that the case be classified as unknown. Magistrate Judge Fox is so Designated. (kz) [Entry date 02/24/95]
4/3/95	3	RETURN OF SERVICE executed as to Attorney Gen'l NYS, New York State Police, James W. McMahon, NYS Policemen & Fire, H. Carl McCall by Christopher Warner on 3/2/95 Answer due on 3/22/95 for Attorney Gen'l NYS, for New York State Police, for James W. McMahon, for NYS Policemen & Fire, for H. Carl McCall. RETURN OF SERVICE executed as to Thomas Constantine by David E. Kirlin on 3-10-95 Answer due on 3-30-95 for Thomas Constantine. RETURN OF SERVICE executed as to Edward Regan by David Harris on 3-23-95. Answer due on 4-12-95 for Edward Regan. (jag) [Entry date 04/13/95] [Edit date 04/13/95]
4/4/95	2	STIPULATION (It is hereby stipulated and agreed by the undersigned that the time for defendants Attorney General, Superintendent James W. McMahon, Thomas Constantine, New York State Policemen's and Fireman's Retirement System, and Comptroller H. Carl McCall ("defendants") to answer or move in response to

		the complaint herein is extended to and including May 2, 1995, and, if defendants move, plaintiff will serve any opposing papers on or before May 19, 1995. So ordered.) (signed by Judge Barrington D. Parker Jr.). (kz) [Entry date 04/05/95]
5/9/95	4	STIPULATION and ORDER, extending time for all defendants to answer or move in response to the complaint to and including May 19, 1995, and, if defendants move, plaintiff will serve any opposing papers on or before June 19, 1995 (So ordered. 5/5/95) (signed by Judge Barrington D. Parker Jr.). (kz)
9/19/95	5	ORDER substituting the firm of Gaba & Stober, P.C. for the firm of Leeds & Morelli. SO ORDERED. (signed by Judge Barrington D. Parker Jr.); Copies mailed (jag)
2/29/96	6	Notice of reassignment - to Judge Jed S. Rakoff. Copy of notice and judge's rules mailed to Attorney(s) of record: Louis D. Stober, Stephen M. Jacoby. (11) [Entry date 03/01/96]
5/7/96	–	Pre-trial conference held before USDJ Rakoff; court reporter Randi Friedman (jag) [Entry date 05/08/96]

Docket as of July 10, 1997 11:41 am

26. That plaintiff had a verified disability in accordance with the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*).

27. That in February 1989 plaintiff was involuntarily transferred back to road patrol, even while he continued to require accommodation for his disability.

28. That other similarly situated Troopers, who were not disabled were allowed to remain stationed in the Communications section of Troop Headquarters for periods exceeding eight years, until their retirement.

29. That plaintiff's superior officer, Sergeant Charles Heady, refused any such accommodation for plaintiff and returned plaintiff to road patrol.

30. That plaintiff filed a grievance with supervisors protesting the involuntary transfer when there were less senior members available and requested to return back to the communications section. This grievance has not been answered to date.

14, 1990]).

5. The enactment of Section 363-b of the Retirement and Social Security Law did not unilaterally diminish or impair the contractual benefits of the members of the New York State and Local Police and Fire Retirement System.

6. Applicant is not eligible for the benefits provided by Section 363 of the Retirement and Social Security Law (Section 363-b of the Retirement and Social Security Law).

7. The New York State and Local Police and Fire Retirement System properly rejected the applicant's Accidental Disability Retirement application (Section 363-b of the Retirement and Social Security Law).

8. The facts in this matter do not give rise to an estoppel (*Boudreau v. Levitt*, 67 AD2d 1053; *Nutt v. New York State Employees' Retirement System*, 72 AD2d 898).

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY DETERMINED AND DIRECTED that the application of MICHAEL MISZKO, JR. for Accidental Disability Retirement be and the same is hereby DENIED.

Dated at Albany, New York, this 12th day of March, 1991.

EDWARD V. REGAN
State Comptroller

BY *(illegible)*
DEFOREST C. PITT
Hearing Officer

RECORD ON APPEAL
APPLICANT'S EXHIBIT F
PAGE 155

New York State and Local Retirement Systems
Employees' Retirement System
Police and Fire Retirement System

Gov. Smith State Office Building, Albany, New York 12244

0A41396-3

02/07/90
001 JW

IN THE MATTER OF THE APPLICATION FOR
NEW YORK STATE POLICE DISABILITY RETIREMENT

NAME:	JR MICHAEL MISZKO
REGISTRATION NUMBER:	0A41396-3
POSITION:	TROOPER
DATE OF APPLICATION:	12/12/89
DATE OF DETERMINATION:	02/02/90
APPLICATION FILED BY:	DIVISION OF STATE POLICE

DETERMINATION

THE APPLICATION FOR NEW YORK STATE POLICE DISABILITY RETIREMENT FILED IN THE RETIREMENT SYSTEM BY THE SUPERINTENDENT OF STATE POLICE HAS RECEIVED MY CONSIDERATION.

IT IS HEREBY FOUND THAT THE ABOVE NAMED MEMBER IS INCAPACITATED FOR THE PERFORMANCE OF DUTIES.

IT IS HEREBY DETERMINED AND DIRECTED THAT THE APPLICATION FOR NEW YORK STATE POLICE DISABILITY RETIREMENT BE AND THE SAME IS HEREBY APPROVED.

EDWARD V. REGAN
STATE CONTROLLER

BY s/Gregory O. Childs

GREGORY O. CHILDS
DIRECTOR, RETIREMENT
BENEFITS

E-9

200a
Application for Accidental Disability Retirement
RS 6047

NYS Employees' Retirement System
Policeman/s and Firemen's Retirement System
Gov. Smith State Office Building, Albany, NY 12244

Registration Number: 0A41396-3
Name: Miszko, Michael Jr.
Sex: Male
Social Security Number: _38365274
Date of Birth: Oct. 21, 1945
Address: RR #1, Box 77-B
Accord, New York 12404
Phone: 914-338-1702

Employer: New York State Police
Payroll Title: Trooper
Length of Service: 16 years, 4 months
Payroll Status: On payroll and receiving salary? Yes.

List Accident Dates & Workers' Compensation Number Assigned:

1. 04/05/75 WCB575 04959
2. 10/13/84 WCB58418362
3. 11/27/86 WCB58623016
4. 09/08/88 WCB58823020
5. 03/13/89 WCB58907826

I am permanently disabled because of:

Internal derangement of right knee, HNPF and acquired spinal stenosis of lower back, stress and anxiety related reactions stemming from the workplace.

I have been treated by the following doctors:

Injury of: 04/05/75	Dr. Herbert Martin, M.D. 210 Wall Street Kingston, NY 12401
Injury of: 10/13/84	Dr. Robert C. Hendler, M.D. Cypress Road Goshen, NY 10924
Injury of: 09/08/88	Dr. Zandra Rios Rivera, M.D. 144 Pine Street Kingston, NY 12401
Injury of: 11/27/86 03/13/89	Dr. John P. Handago, M.D. 17M & South St., Bldg. 800 Goshen, NY 10924

January 24, 1990
Reg: 0A41396-3

New York State
Employees' Retirement System
Policemen's and Firemen's Retirement System
Edward V. Regan, State Comptroller
Gov. Smith State Office Building, Albany, NY 12244

In Reply, Please Refer to Registration Number:

Michael Miszko, Jr.
RR #1, Box 77-B
Accord, NY 12404

Dear Mr. Miszko:

I have received your January 12th letter and reviewed your retirement records.

On December 12, 1989 the Division of State Police filed and application for State Police Disability Retirement on your behalf. This application is currently being processed. By reason of transfer and previous service your date of membership in our System is June 26, 1968. The are no provisions in the Retirement and Social Security Law for members receiving credit for service rendered outside New York State.

I must reject your application for Accidental Disability Retirement as Section 363-b of the Retirement and Social Security Law provides State Police Disability retirement as the only disability benefit available to members who joined the Division of State Police after May 29, 1972.

If you disagree with the contents of this letter you have four months under Section 374 of the Retirement and Social Security Law to demand in writing a hearing and redetermination of this matter.

Very truly yours,

Jay Fremont
Assistant Director
Retirement Benefits

JF:aj

System's Exhibit # 3
Eugene G. Canale 5/31/90

...determination on the merits does not extend the statute of limitations. *Matter of Lubin v. Bd. of Ed.*, 60 N.Y.2d 974, 976 (1983).

The 1991 determination had been based on an examination of numerous sections of the RSSL as applied to Miszko's employment and retirement system membership history, particularly the central fact that he had joined the Division of State Police well after May 1972, the cutoff date for the § 363-b exception. He again applied in May 1991 (Cplt. ¶ 42), shortly after P&F's rejection of his earlier application. Although not couched in terms of a request for reconsideration, the May 1991 application was a transparent effort to seek reconsideration of the recent administrative determination that RSSL § 363-b provides the *only* disability benefit available to members who joined the division of State Police after May 29, 1972, such as Miszko who entered the division on September 16, 1973. Exh. A at 28 29. *See* Exh. A at RA 161. P&F effectively treated the 1991 application as one for reconsideration: in its final disposition, it denied the application because the judgment confirming the earlier determination that Miszko's *exclusive* benefits were under § 363-b meant that P&F could not again consider the issue. Exhs. O, P.

D. No § 1983 Claim is Stated

Even if the prior state court judgment did not have preclusive effect and the claims were timely, Miszko would have no constitutional claim for numerous other reasons, including those set out by the state court. In Cplt. ¶ 51, Miszko conclusorily asserts conspiracy to deprive him of contract rights, due process rights, and equal protection. No contract rights were impaired or taken for . . .

239a

B - Accidental Disability Application (Pages 239a-242a)
Application for Accidental Disability Retirement
RS 6047

Received - 117: Jan 18, 1990
NY State Employees' Retirement System
Policemen's and Firemen's Retirement System
Gov. Smith State Office Building, Albany, NY 12244

Registration Number: 0A41396-3
Name: Miszko, Michael Jr.
Sex: Male
Social Security Number: 088365274
Date of Birth: Oct. 21, 1945
Address: RR #1, Box 77-B
Accord, New York 12404
Phone: 914-338-1702

Employer: New York State Police
Payroll Title: Trooper
Length of Service: 16 years, 4 months
Payroll Status: On payroll and receiving salary? Yes.

List Accident Dates & Workers' Compensation Number Assigned:

1. 04/05/75 WCB575 04959
2. 10/13/84 WCB58418362
3. 11/27/86 WCB58623016
4. 09/08/88 WCB58823020
5. 03/13/89 WCB58907826

I am permanently disabled because of:

Internal derangement of right knee, HNP and acquired spinal stenosis of lower back, stress and anxiety related reactions stemming from the workplace.

I have been treated by the following doctors:

Injury of: 04/05/75	Dr. Herbert Martin, M.D. 210 Wall Street Kingston, NY 12401
Injury of: 10/13/84	Dr. Robert C. Hendler, M.D. Cypress Road Goshen, NY 10924
Injury of: 09/08/88	Dr. Zandra Rios Rivera, M.D. 144 Pine Street Kingston, NY 12401
Injury of: 11/27/86 03/13/89	Dr. John P. Handago, M.D. 17M & South St., Bldg. 800 Goshen, NY 10924

List Hospitalizations:

Admit Date: 09/04/85	Goshen Professional Bldg. Cypress Road Goshen, New York 10924
Admit Date: 11/27/86	Horton Memorial Hospital 60 Prospect Avenue Middletown, NY 10940
Admit Date: 03/13/89	Benedictine Hospital 105 Mary's Avenue Kingston, NY 12401

September 18, 1984

New York State
Employees' Retirement System
Policemen's and Firemen's Retirement System
Edward V. Regan, State Comptroller
Gov. Smith State Office Building, Albany, NY 12244

In Reply, Please Refer to Registration Number: 0A41396-3

Michael Miszko, Jr.
RR #1, Box 77B
Accord, NY 12404

Dear Mr. Miszko:

As per your request we have checked your records. Your date of membership is June 26, 1968.

The crediting of this service will be considered in the calculation of any benefits payable.

Sincerely,

(Shirley Ryer signature)

Shirley Ryer
Employees' Retirement
Membership Examiner IV

SR: lbp

Proposed Amended Complaint (Pages 249a-268a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MICHAEL MISZKO, JR., on behalf of himself and all other similarly situated persons,

Plaintiff,

-against-

AMENDED VERIFIED COMPLAINT

95 CV 01111 (JSR)

Jury Trial Demanded

STATE OF NEW YORK, ATTORNEY GENERAL OF NEW YORK STATE, NEW YORK STATE POLICE, JAMES W. McMAHON, Superintendent of the New York State Police, THOMAS A. CONSTANTINE, former Superintendent of the New York State Police, WILLIAM H. ANTON, Director of Personnel of the New York State Police, NEW YORK STATE AND LOCAL, POLICE AND FIRE RETIREMENT SYSTEM, H. CARL McCALL, Comptroller, EDWARD REGAN, former Comptroller, JOHN McMANAMAN, Assistant Deputy Comptroller, JAY FREMONT, Director, Retirement Benefits, THE STATE INSURANCE FUND, MARGARET PECORONI, Sr. Compensation Claims Examiner,

Defendants.

----------X

CLASS ACTION COMPLAINT

Plaintiff, MICHAEL MISZKO, JR., by his attorneys, Gaba & Stober, P.C., complaining of the defendants, alleges as follows:

JURISDICTION AND VENUE

1. This is a civil action based on cases and controversies arising under the United States Constitution and seeking monetary damages and affirmative relief pursuant to 42 U.S.C., §1983 to redress the deprivation under ordinance, custom and usages of all rights, privileges and immunities secured to the Plaintiff by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States; as well as by 42 United States Code, §§1981, 1985, 1988 and 1991, and all the laws and statutes thereunder; and further seeking, pursuant to Rule 57 of the Federal Rules of Civil Procedure, a judgment declaring §§363-b and 363-c, subd. h. of the New York State Retirement and Social Security Law ("RSSL") unconstitutional; and further seeking, monetary damages and affirmative relief from defendants in their individual and official capacities more fully described below, pursuant to Article I, §10 of the U.S. Constitution, Obligations of Contract, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C., §794, *et. seq.*, the Americans with Disabilities Act ("ADA"), 42 U.S.C., §12101 *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C., §623 *et seq.*

2. The amount of the matter in controversy for the above named Plaintiff exceeds, exclusive of interest and costs, the sum or value of fifty thousand dollars ($50,000).

3. Class Action status is sought pursuant to Rule 23 of the Federal Rules of Civil Procedure.

THE PARTIES

4. Plaintiff, **MICHAEL MISZKO, JR.,** ("Miszko" or "Plaintiff") at all times hereinafter, was over forty (40) years of age and is now a fifty (50) year old white male and was and still is a resident of the County of Ulster, State of New York, specifically residing at 209 Van Tyne Road, Accord, New York 12404.

5. Defendant, **State of New York,** ("State"), at all times relevant hereto, was and is now a public employer within the meaning of Article 14 of the New York State Civil Service Law, is an employer within the meaning of §701 (b) of Title VII, and the ADA in that it engages in an industry affecting commerce, is receiving federal financial assistance and has employed more than the requisite number of persons for the requisite duration under Title VII and employed Miszko as a State Trooper.

6. Defendant, **Attorney General of the State of New York**, is charged with the execution of the laws of the State.

7. Upon information and belief, the defendant Attorney General of the State of New York has its principal place of business at The Capitol, Albany, New York 11224.

8. Defendant, **New York State Police** ("State Police") is an agency of the State of New York, that employed Miszko, and is charged with the enforcement of the statutes, ordinances, regulations, customs and usages of the State of New York.

9. That upon information and belief, the principal place of business of the defendant State Police is Building 22, New York State Campus, Albany, New York 12226.

10. Upon information and belief, defendant **Thomas A. Constantine** ("Constantine"), at all times relevant hereto, was the duly appointed Superintendent of the New York State Police and, therefore, was responsible for the operation of the State Police, including those improper and/or unlawful activities and conduct complained herein they committed against Plaintiff and are continuing to commit.

11. Upon information and belief, defendant **William H. Anton** ("Anton"), is the current duly appointed Director of Personnel for the State Police and, therefore, at all times relevant hereto, was responsible for the administration of personnel matters including, but not limited to, disability retirement matters.

12. Upon information and belief, defendant **James W. McMahon** ("McMahon"), is the current duly appointed Superintendent of the State Police and, therefore, at all times relevant hereto, was responsible for the operation of the State Police, including those improper and/or unlawful activities and conduct complained herein they committed against Plaintiff and are continuing to commit.

13. Defendant, **New York State and Local, Police and Fire Retirement System** ("P&F"), is charged with the administration and management of the various P&F retirement plans including, but not limited to, disability retirements.

14. Upon information and belief, the principal place of business of the defendant P&F is the Governor Alfred E. Smith State Office Building, Albany, N.Y. 12244.

15. Upon information and belief, defendant **H. Carl McCall**, ("McCall") is the current duly elected Comptroller of the State of New York and, therefore, at all times relevant hereto, is responsible for the operation, administration, and management of the funds of the P&F and The State Insurance Fund, including those improper and/or unlawful activities and conduct complained herein the P&F committed against Plaintiff and are continuing to commit.

16. Upon information and belief, defendant **Edward V. Regan** ("Regan"), al all times relevant hereto, was the duly elected Comptroller of the State of New York and, therefore, was responsible for the operation, administration, and management of the funds of the P&F and The State Insurance Fund; including those improper and/or unlawful activities and conduct complained herein they committed against Plaintiff and are continuing to commit.

17. Upon information and belief, defendant **John McManaman** ("McManaman"), at all times relevant hereto, was the duly appointed Assistant Deputy Comptroller of the State of New York and, therefore, was and still is responsible for the operation of the P&F including those improper and/or unlawful activities and conduct complained herein they committed against Plaintiff and are continuing to commit.

18. Upon information and belief, defendant **Jay Fremont** ("Fremont"), at all times relevant hereto, was the duly appointed Assistant Director of Retirement Benefits and is now the Director of Retirement benefits for the P&F and, therefore, was and still is responsible for the administration of retirement matters including, but not limited to, disability retirement matters.

19. Defendant, **The State Insurance Fund** ("SIF"), is an insurance agency operating within the State of New York, with significant State involvement, and is charged with the responsibility to administer Workers' Compensation benefits; as such, they have been acting in concert with the State, including those improper and/or unlawful activities and conduct complained herein they committed against Plaintiff and are continuing to commit.

20. Upon information and belief, the principal place of business for defendant SIF is 15 Computer Drive West, Albany, New York 12205.

21. Upon information and belief, defendant **Margaret Pecoroni** ("Pecoroni"), is the current duly appointed Senior Compensation Claims Examiner for the SIF and, therefore, at all times relevant hereto, is responsible for the administration of Plaintiff's Workers' Compensation benefits, medical care and treatment.

FACTS

22. Plaintiff, Miszko, is a 50 year old white male who has been determined by the Defendants to be permanently disabled.

23. Plaintiff, Miszko, will fairly and adequately represent all similarly situated individuals and his claims are the same as or typical of the claims of the other proposed class members in that the actions of the Defendants are widespread and perpetrated on all members of the class since on or about May 30, 1972.

24. Miszko became enrolled as a Tier I member of the P&F on June 26, 1968.

25. That at the time he first entered the P&F, Miszko was employed as a Police Officer for the City of Kingston, State of New York.

26. Miszko subsequently left the City of Kingston Police force on September 11, 1969 to become a Correction Officer with the New York State Department of Corrections and enrolled as a member of the New York State and Local Employees Retirement System (ERS).

27. That after leaving employment with the New York State Department of Corrections on June 29, 1970, Miszko did not engage in public employment in the State of New York until September 6, 1973, when he began employment with the New York State Division of State Police as a State Trooper.

28. That prior to commencing employment with the New York State Division of State Police, Miszko was specifically advised by the ERS and P&F members, in writings, that his rights, benefits, and privileges of membership under those systems would not be diminished or impaired.

29. That when Miszko commenced employment with the State Police he formally transferred his ERS credits to P&F, as permitted by state laws, and retained his Tier 1 status and resumed membership in the P&F with an effective date of membership of June 26, 1968. (copies of letters annexed hereto as Exhibit "D".)

30. That Miszko was, at all times relevant hereto, a Tier I member of the P&F with an original effective entry date into that system of June 26, 1968.

31. That Miszko had a valid contractual relationship with the P&F effective June 26, 1968 and continuing to the present date.

32. That this contract entitled Miszko to an accidental disability benefit of 75% of his final average salary upon being retired due to accidental disability pursuant to §363, Retirement and Social Security Law ("RSSL").

33. That on October 13, 1984, Miszko incurred an on-the job accidental injury to his right knee.

34. That as a result of said injury and disability, Miszko was forced to take sick leave from work, was and is substantially limited in his life activities, including employment, was and is regarded as having a permanent impairment, and is limited in his employment potential.

35. That when he returned to work, Miszko was given an assignment in the Communications section of Troop "F" Headquarters as an accommodation for his disability.

36. That Miszko was and is otherwise qualified to perform the job of State Trooper with reasonable accommodation.

37. That Miszko has a verified disability in accordance with the Americans with Disabilities Act of 1990 (42 U.S.C., §12101 *et seq.*)

38. That in February of 1989, Miszko was involuntarily transferred back to road patrol, even while he continued to require accommodation for his disability.

39. That other similarly situated Troopers, who were not disabled, were allowed to remain stationed in the Communications section of Troop Headquarters for periods exceeding eight years, until their retirement.

40. That Miszko's immediate supervisor Sergeant Charles Heady and defendant Constantine, refused any such reasonable accommodation for plaintiff and returned him to road patrol.

41. That Miszko filed a grievance with supervisors protesting the involuntary transfer when there were less senior members available and requested to return back to the Communications Section. This grievance has not been answered to date.

42. That Sergeant Charles Heady subjected Miszko to a continuing course of harassment and discrimination by reason of Miszko's disability.

43. That although Miszko had excellent performance ratings, he was denied reasonable accommodations for work or promotions.

44. That as a result of defendants harassment and discrimination, Miszko suffered extreme emotional distress resulting in anxiety attacks, nausea and vomiting, severe headaches, depression, cold chills, muscle cramps and spasms, sweats and nervousness.

45. As already noted in the Complaint, Miszko was discriminated by the Superintendent filing the application for retirement and Plaintiff not receiving reasonable accommodations for work or promotions.

46. That on March 13, 1989 Plaintiff was again accidently injured on the job, reinjuring his knee and injuring his lower back.

47. That these injuries necessitated his being out on disability for approximately one year.

48. That on or about January 15, 1990, Plaintiff learned that defendants Anton and Constantine filed an application to retire Plaintiff on December 12, 1989 under §363-b, RSSL, State Police Disability, despite his requests to return to work.

49. Defendants Anton and Constantine refused to file a separate and distinct §363, RSSL application to retire Plaintiff on accidental disability, despite his Tier 1 status with P&F.

50. That although Plaintiff is considered a Tier 1 member of P&F, he is entitled to receive 75% accidental disability retirement benefits in accordance with §363 of the RSSL, he instead receives a diminished disability retirement of only 50% by reason of the provisions of §363-b of the RSSL, despite defendants conceding that Plaintiff incurred a permanent accidental disability. This action has resulted in the loss of approximately $10,000 in benefits per year, over the past six years, to Miszko.

51. That although Plaintiff is disabled and over 40. he was capable of performing his job as a State Trooper with reasonable accommodation, despite his age, race and disability.

52. That defendants State of New York, State Police, Anton and Constantine denied Plaintiff said reasonable accommodations and opportunities for promotions and forced him to retire.

53. That on January 18, 1990, Plaintiff filed an application for accidental disability pursuant to §363, RSSL but defendants Regan, McManaman and Fremont wrongfully denied such benefits on January 24, 1990, claiming he is *only* eligible for the *lesser* benefits under §363-b of the RSSL.

54. That in May of 1991, Plaintiff filed an application for performance of duty disability pursuant to §363-c of the RSSL to invoke the §363, RSSL, accidental disability provision but the P&F defendants, at all times relevant hereto, again wrongfully denied said application in or about September of 1993, based on §363, subd. h. and Plaintiff receiving a *lesser* benefit under §363-b of the RSSL.

55. That the enactment of §363-b and §363-c, subd. h. of the RSSL violates the Contracts Clause of the United States Constitution in that it impermissibly and unlawfully violates the obligation of contracts. (U.S. Constitution, Art. I, §10, cl. 1)

56. That §363-b and §363-c, subd. h. of the RSSL are unconstitutionally vague and overbroad.

57. That §363-b and §363-c, subd. h., RSSL on their face and as applied, violate the equal protection clause of the United States Constitution.

58. That Miszko requested defendants State Police and P&F legislatively amend §363-b, RSSL to end the disparate treatment received by pre-1972 members of P&F such as Miszko. The aforesaid request was ignored.

59. That since Plaintiff's disability retirement from the New York State Police, the defendants, including SIF and Pecoroni, have denied Plaintiff reasonable accommodations for his disabilities, reasonably necessary medical care and treatment of his disabilities and for his out of pocket reasonably necessary medical expenses; notwithstanding defendants granting similar considerations to other disabled members.

60. That Plaintiff filed complaints, all to no avail, with the New York State Department of Health, Albany, New York and the New York State Insurance Department, Albany, New York with respect to the improper and/or unlawful activities and discriminatory conduct defendants SIF and Pecoroni have committed and are continuing to commit against the Plaintiff.

61. That Plaintiff filed complaint with the Equal Employment Opportunity Commission ("EEOC") regarding Defendants actions and after receiving an initial response, filed a substantial weight review. The EEOC rendered its decision on his review on October 11, 1995. Therefore, all administrative remedies have now been exhausted on his discrimination claims.

AS AND FOR THE FIRST THROUGH NINTH CAUSES OF ACTIONS

62. Plaintiff repeats and realleges each and every allegation set forth above with the same force and effect as if more fully set forth hereat.

63. Plaintiff was a member of the City of Kingston Police and a member of the P&F from June 26, 1968 through September 11, 1969 and continuing to date.

64. Defendants, with exception of SIF and Pecoroni, refused to give Plaintiff credit towards accidental disability benefits for his membership with the P&F from June 26, 1968 to September 11, 1969 and continuing to date.

65. Defendants, with exception of SIF and Pecoroni, wrongfully filed an application for retirement pursuant to §363-b of the RSSL against Plaintiff's wishes even though he was capable of performing the essential functions of his job with reasonable accommodation.

66. Defendants, with exception of SIF and Pecoroni, wrongfully, arbitrarily, and in a discriminatory manner, determined that Plaintiff's initial entry date into the P&F was September 6, 1973, the plaintiff's first day on the job with the

State Police. In fact, Plaintiff was first a member of the P&F as of June 26, 1968.

67. Defendants SIF and Pecoroni, wrongfully, arbitrarily, in an abusive and discriminatory manner, have deprived Plaintiff of his Workers' Compensation benefits including, but not limited to, reimbursements and reasonably necessary medical care and treatment for his disabilities.

68. That defendants, under color of state law and while receiving and/or administering federal financial aid and/or assistance or other employee benefit plan for the State of New York and, in an industry affecting commerce, have conspired to deprive Plaintiff of his Constitutional Rights; including his vested property rights in the terms and conditions of his employment contract and in his disability pension, his right to due process and his right to equal protection under the law, all in violation of the Constitution of the United States, the First, Fourth, Fifth, Ninth and Fourteenth Amendments thereof, and the Civil Rights statute of the United States 42 U.S.C., §§1981,1983,1985 and 1991.

69. By reason of the defendants' continuing violations, Plaintiff has suffered loss of pension and other benefits in addition to suffering great mental anguish, emotional and physical pain, and severe humiliation both personal and professional, all to his damage.

WHEREFORE, Plaintiff demands judgment against defendants, and each and every one of them, in the sum of TWO MILLION DOLLARS ($2,000,000) as and for compensatory damages, and demands judgment against defendants in the sum of TWO MILLION DOLLARS ($2,000,000) as and for punitive damages based upon the continuing abridgment of Plaintiff's constitutional rights; and further demands that Plaintiff be awarded such other and further damages and relief as due and required and as this Honorable Court finds just and proper, to make Plaintiff whole, including performance of said employment contract together with interest,

costs, and disbursements of this action, including reasonable attorney's fees and expenses.

AS AND FOR THE TENTH AND ELEVENTH CAUSES OF ACTIONS

70. Plaintiff repeats and realleges each and every allegation set forth above with the same force and effect as if more fully set forth hereat.

71. Defendants, with exception of SIF and Pecoroni, wrongfully determined that Plaintiff's initial entry date into the P&F was September 6, 1973, and accordingly, denied Plaintiff entitlement to an accidental disability retirement allowance pursuant to §363 of the RSSL.

72. Section 363-b of the RSSL entitles certain members of the State Police who entered or reentered service in the Division of State Police before May 30, 1972 to apply for accidental disability retirement pursuant to §363 of the RSSL. Members of the State Police who entered service in the Division of State Police after May 30, 1972 can apply for State Police disability retirement only under §363-b RSSL (see paragraph 58 supra).

73. Section 363-c, subd. h., RSSL, precludes members of the State Police from applying for accidental disability benefits pursuant to the RSSL if they are otherwise eligible for the benefits pursuant to §363-b, RSSL.

74. Defendants' actions in granting selective entitlement preferences to members of the Division of State Police who entered or reentered service in the Division of State Police before May 30, 1972, is not justified by a compelling governmental interest and is in direct violation of the Constitution of the United States and the Fourteenth Amendment thereof.

75. Defendants' actions in granting selective entitlement preferences to members of the Division of State Police and not providing Miszko with a reasonable accommodation or reasonably necessary medical care, treatment and benefits, while

other members are given such considerations, violates Miszko's terms and conditions of his employment contract and is contrary to Federal and State laws, including those stated herein, having been made and provided for in such cases.

76. That the enactment of §363-b and §363-c, subd. h. of the RSSL violates the Contracts Clause of the United States Constitution in that said sections impermissibly and unlawfully violate the obligation of contracts in violation of the United States Constitution, Article I, §10, clause 1.

77. That §363-b and §363-c, subd. h. of the RSSL are unconstitutionally vague and overbroad.

78. That §§363-b and 363-c, subd. h. of the RSSL, on their face and as applied, violate the equal protection clause of the United States Constitution.

WHEREFORE, Plaintiff prays for a declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure declaring him to be eligible for the greater accidental disability benefit (75% of final average salary) afforded other similarly situated Tier 1 members of P&F pursuant to §363, RSSL; and further declaring that §§363-b (currently written with service in the Division of State Police date limitations as the only benefit available to some but not all Tier 1 state police members of P&F) and 363-c, subd. h. of the RSSL (that precludes Tier 1 state police members of P&F from being eligible for §363, RSSL, accidental disability benefits) are inapplicable to Plaintiff, or that they are illegal, void, unconstitutional and ineffective, and without force of law, and that Plaintiff is not required to comply with their terms and provisions as they pertain to receiving lesser benefits when a greater benefit is available under the aforesaid law and granted to other similarly situated persons; and further demands that Plaintiff be awarded such other and further damages and relief as due and required and as this Honorable Court finds just and proper, to make Plaintiff whole, together with interest, costs, and disbursements of this action, including reasonable attorney's fees and expenses.

AS AND FOR THE TWELFTH AND THIRTEENTH CAUSES OF ACTIONS

79. Plaintiff repeats and realleges each and every allegation set forth above with the same force and effect as if more fully set forth hereat.

80. That Plaintiff was and still is, since October 13, 1984, a handicapped or disabled individual.

81. That Plaintiff was and still is otherwise qualified to perform the duties of his job, with reasonable accommodation.

82. That the defendants refused to provide a reasonable accommodation and reasonably necessary medical care, treatment and benefits, to the Plaintiff.

83. That in February 1989, Plaintiff was involuntarily transferred back to road patrol.

84. That Plaintiff filed a grievance with regard to said involuntary transfer.

85. That said grievance has remained unanswered to date.

86. That as set forth above, defendants have harassed and discriminated against Plaintiff, denied him proper medical care, promotions, and forced him to involuntarily retire all because of his disability or handicap.

87. That upon information and belief, defendants have intentionally discriminated against Plaintiff because of his disability in violation of the Rehabilitation Act, 29 U.S.C., §794 *et seq.* and the Americans With Disabilities Act, 42 U.S.C., §12101 *et seq.*

88. That by virtue of the defendants' actions and treatment of Plaintiff as alleged herein, defendants violated Plaintiff's rights, protected under the Rehabilitation Act, 29 U.S.C., §794 *et seq.* and the Americans With Disabilities Act, 42 U.S.C.. §12101 *et seq.*

89. By reason of the foregoing, Plaintiff has suffered a loss of earnings and accrued benefits, great pain and mental anguish for the improper and/or unlawful activities and discriminatory

conduct they have committed against him and are continuing to commit.

WHEREFORE, Plaintiff demands judgment against the defendants and each and every one of them, in the sum of TWO MILLION DOLLARS ($2,000,000) as and for compensatory damages, and demands judgment against defendants in the sum of TWO MILLION DOLLARS ($2,000,000) as and for punitive damages; and further demands that Plaintiff be awarded back pay and lost benefits and such other relief as due and required and as this Honorable Court finds just and proper together with interest, costs, and disbursements of this action, including reasonable attorney's fees and expenses. Plaintiff further demands that the defendants be ordered to reinstate and promote the Plaintiff, with full seniority and provide him with reasonable accommodations and reasonably necessary medical care and treatments.

AS AND FOR A FOURTEENTH CAUSE OF ACTION

90. Plaintiff repeats and realleges each and every allegation set forth above with the same force and effect as if more fully set forth hereat.

91. Plaintiff, at all times relevant hereto, was over forty (40) years of age. His date of birth is October 21, 1945.

92. Defendants, with exception of SIF and Pecoroni, have conspired to "maintain a healthy, vigorous and youthful police force" and forced Plaintiff to retire because of his age and disability.

93. That upon information and belief, defendants have intentionally discriminated against Plaintiff because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C., §623 *et seq.*

94. That by virtue of the defendants' actions and treatment of Plaintiff as alleged herein, defendants have violated Plaintiff's rights, protected under the Age Discrimination in Employment Act, 29 U.S.C.. §623 *et seq.*

95. By reason of the foregoing, Plaintiff has suffered a loss of earnings, accrued benefits, great pain and mental anguish for the improper and/or unlawful activities and discriminatory conduct they have committed against him and are continuing to commit.

WHEREFORE, Plaintiff demands judgment against the defendants and each and every one of them, in the sum of TWO MILLION DOLLARS ($2,000,000) as and for compensatory damages, and demands judgment against defendants in the sum of TWO MILLION DOLLARS ($2,000,000) as and for punitive damages; and further demands that Plaintiff be awarded back pay and lost benefits and such other relief as due and required and as this Honorable Court finds just and proper together with interest, costs, and disbursements of this action, including reasonable attorney's fees and expenses. Plaintiff further demands that the defendants be ordered to reinstate and promote the Plaintiff, with full seniority and provide him with reasonable accommodations and reasonably necessary medical care and treatments.

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial by right of all triable issues to this complaint.

Dated: Mineola, N.Y.
March , 1996

GABA & STOBER, P.C.
Attorneys for Plaintiff
222 Old Country Road
Mineola, NY 11501
(516) 742-0242

By s/Louis D. Stober
LOUIS D. STOBER
LS-9318

VERIFICATION

STATE OF NEW YORK

SS.:

COUNTY OF ULSTER

MICHAEL MISZKO, JR., being duly sworn states that he is the Plaintiff in this action and that the foregoing Verified Amended Complaint is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief and as to those matters, he believes them to be true.

(Michael Miszko, Jr. signature)
MICHAEL MISZKO, JR.

Sworn to this 30th day
of March, 1996

(Phyllis Frey [Ackerley] signature)
Notary Public, State of New York
No. 4978094
Qualified in Ulster County
Commission Expires Feb. 25, 1997

Plaintiff's Memorandum of Law in Opposition to Motion and in Support of Cross-Motions, with Attachments (Pages 269a -291a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
MICHAEL MISZKO, JR.,

Plaintiff,

CV 95-01111
(JSR, J.)

-against-

ATTORNEY GENERAL OF NEW YORK STATE, NEW YORK STATE POLICE, JAMES W. McMAHON, Superintendent of the New York State Police, THOMAS A. CONSTANTINE, former Superintendent of the New York State Police, NEW YORK STATE POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, H. CARL McCALL, Comptroller, EDWARD V. REGAN, former Comptroller,

Defendants.
----------X

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS
AND
IN SUPPORT OF CROSS MOTIONS TO AMEND AND FOR CLASS ACTION STATUS.

GABA & STOBER, P.C.
Attorneys for Plaintiff
222 Old Country Road

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(516) 742-0242

LOUIS D. STOBER, ESQ.
MICHAEL MISZKO, Jr., J.D.
On the Memorandum

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COUNTER STATEMENT OF FACTS

As set forth in the Verified Complaint and the Affidavit of Michael Miszko, Jr. (hereinafter "Miszko"), dated March , 1996, this case comes before this Honorable Court based on the treatment Miszko has received by the Defendants since he suffered on the job injuries on March 13, 1989 (see for example, Proposed Amended Complaint paragraph 46). Miszko was employed as a State Trooper until the date the disability retirement filed by defendants William H. Anton (hereinafter "Anton"), Director of Personnel, Division of New York State Police and former Superintendent Thomas A. Constantine (hereinafter "Constantine") was approved. The actions taken against Miszko have been continuing in nature and constitute:

a. violations of the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C.§§S12101 *et seq.*
b. violations of his due process and equal protection rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the U.S. Constitution,
c. violations of The Civil Rights Act of 1964 ("CRA"), 42 U.S.C. §§1981, 1983, 1985, and 1991 and,
d. violations of §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 *et seq.*
e. violations of Art. I, §10, U.S. Const., Obligations of Contract.
f. violations of the Age Discrimination in Employment Act ("ADEA") 29 U.S.C. §623 *et seq.*

Against this backdrop of claims, the Defendants have filed the instant motion to dismiss pursuant to FRCP Rules 12(b)(1) and 12(b)(6). For the reasons set forth in this Memorandum, the accompanying affidavit and all of the proceedings and papers previously filed, the Defendants' motion must be denied.

RETIREMENT BENEFIT CLAIMS

Contrary to the Defendants arguments, Miszko's retirement benefit claims are not precluded by a prior state court judgment. The state court judgment in *Miszko v. Regan*, dealt solely with certain Article 78 type arguments and in no way fully developed the violations of the U.S. Constitution now being asserted. The fact remains that the Defendants have illegally and unconstitutionally taken away a protected property right of Miszko's (i.e., entitlement to vested accidental disability retirement benefits under §363, Retirement and Social Security Law (RSSL)) and provided him with a *lesser* retirement benefit, all to his extreme detriment. The Defendants have impaired his contractual relationship in violation of Article I, Section 10 as well as under the aforementioned Amendments to the U.S. Constitution.

THE DISCRIMINATION CLAIMS

By failing to accommodate Miszko's disability, the Defendants have violated the ADEA, ADA and the Rehabilitation Act, as well as the CRA, §§ 1981, 1983, 1985, and 1991. With respect to the Defendants claim that all the actions taken against Miszko occurred prior to the effective date of the ADA, the fact remains that the discriminatory conduct has been ongoing and with continuing consequences since 1989, 1990 and 1994.

Furthermore, due to the ongoing and continuous nature of the discriminatory conduct exhibited against Miszko, the Rehabilitation Act and CRA §§1981, 1983, 1985 and 1991 claims are still ripe. The Defendants further claim they are immune from suit under §1983, however, the Courts have held that the 11th Amendment does not bar suit in federal court against state agencies, receiving federal financial assistance, or officials, as well as for prospective injunctive relief to remedy a continuing wrong. Further, in determining whether

Defendants are alter egos of the State of New York for 11th Amendment purposes, there are a whole series of tests Defendants must establish apply to them. The Defendants have failed to meet these tests. Also, State sovereign immunity has no application to claims brought in federal court under federal laws.

Moreover, Miszko has proved a prima facie case of unlawful discrimination not only by credible direct evidence but also by credible indirect evidence. Miszko has established the following:

1. that he belonged to a protected group;
2. that he applied and was qualified for a job for which the employer was seeking applicants;
3. despite his qualifications, he was rejected, and;
4. after that rejection, the position remained open, and the employer continued to seek applicants with similar qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Miszko's prima facie case of unlawful discrimination shifts the burden to defendants to produce a lawful explanation of the treatment accorded to Miszko. That explanation must consist of not only a non-discriminatory reason for defendants actions, but also "credible" evidence in support of defendants explanation. The defendants have failed to show that the adverse employment actions were taken for a legitimate non-discriminatory reason. *Id.* Therefore, the defendants motion to dismiss this action must be denied in its entirety. See, *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 781 (1983); *Thornbrough v. Colombus & G. R.R. Co.,* 760 F.2d 633 (5th Cir. 1985); *Dister v. Continental Group, Inc.,* 859 F.2d 1108, 1112 (2d Cir. 1988); *St. Mary's Honor Center v. Hicks,* U.S. (1993), 113 S.Ct. 2742, 62 FEP cases (BNA) 96 (1993).

RES JUDICATA & COLLATERAL ESTOPPEL

For the reasons set forth in this Memorandum of Law, Miszko's claims are not barred under res judicata, collateral estoppel or any other theory of issue preclusion. For purposes of the instant motion, all allegations in the Complaint must be assumed to be true and given effect most favorable to plaintiff. Given this, it is clear that Miszko has made out valid causes of action that have not been fully and completely developed previously in order to warrant preclusion herein.

All issues will be fully developed in the point headings below.

POINT I
CAUSE OF ACTION AGAINST THE ATTORNEY GENERAL

The Defendants claim that the Attorney General is not a necessary party to the instant suit because he is merely the litigation counsel to the State. While it is true that the Attorney General is litigation counsel to the State, he is also imbued with the specific authority and power to ensure the laws and Constitution are complied with by all State officials and employees, and without discriminating against anyone. In the instant case, Miszko has named several State officials in both their official and individual capacities for the discriminatory and unconstitutional actions taken against him. By failing to uphold the law, the Attorney General has condoned and contributed to the actions against Miszko. Therefore, he is an indispensable party and a properly named defendant. As the Supreme Court held in *Ex Parte Young*, 209 U.S. 123,157, at: 159-160:

> "If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, and he is in that case stripped of his official or representative character and is

> subjected in his person to the consequences of his individual conduct. The State has no power to impart him any immunity from responsibility to the supreme authority of the United States."

In addition, the Proposed Amended Complaint names the State of New York as a party Defendant. If this Court deems the State and not the Attorney General is the appropriate defendant then the Amended Complaint corrects that situation.

POINT II
THE ELEVENTH AMENDMENT IS NOT A BAR TO THE INSTANT LITIGATION

The Defendants allege that the eleventh amendment bars federal suit against the State Police for any relief. This is simply not true. See *Scanlon v. Atascadero State Hosp.*, 735 F.2d 359, cert. granted 105 S.Ct. 503, 83 L.Ed.2d 395 (1984), (receipt of funds from programs under this chapter constituted waiver of its 11th Amendment immunity from employees suit alleging employment discrimination against the handicapped.) The State Police are specifically liable under the ADA and the Rehabilitation Act for the actions taken against Miszko. Furthermore, the State Police are liable under §§1981, 1983, 1985 and 1991 prospectively for its continued refusal to employ Miszko as a State Trooper with reasonable accommodation to his disability, as well as for continuing to allow him to be paid lesser retirement benefits under the provisions of unconstitutional statutes (363-b and 363-c, subd. h., RSSL). See, ex., *United States v. City of Yonkers,* 880 F.Supp. 212; Eleventh amendment does not bar suit in federal court against state official for prospective injunctive relief to remedy a continuing wrong. In fact, §1983 can serve as an affirmative basis for liability.

Furthermore, in determining sovereign immunity, the Court must determine whether

a. the money that would pay a judgment would come from the State;
b. the status of the agency under state law;
c. the degree of autonomy the agency has;
d. and the most important factor in determining alter ego status is how payment of the judgment will affect the general revenues of the state. See: *In re: Groves*, 120 B.R. 956.

In the instant case, the Division of State Police is an autonomous state agency with broad powers to act independently of any other agency or branch of State government. Furthermore, any judgment obtained in this case would entail payment from the State Police budget and from individual defendants. The monies would not come from the general revenues of the state. Since the State Police are recipients of Federal aid and grants, an analysis of the State Police budget shows that it is possible for the funds to pay the judgment to come not from the State but from a variety of other sources. Unless the Defendants can prove the monies would come solely from general revenues, their sovereign immunity claim falls. See also, *Pelican Marine Carriers, Inc. v. City of Tampa,* 791 F.Supp. 845 aff'd 4 F.3d 999, State sovereign immunity has no application to claims brought in federal court under federal law.

Those same arguments apply with equal force to the State officials named as Defendants including the present and former Superintendents of the State Police, the present Director of Personnel for the New York State Police, the present and former Comptrollers and the New York State and Local, Police and Fire Retirement System (hereinafter "P&F") and the former and present Attorneys General.

The Defendants concede that they are bound by the aforementioned statutes in their individual capacities for the actions taken against Miszko.

Those actions include Constantine's refusal to re-employ Miszko after his 1989 injury and unilaterally applying for a

lesser disability retirement despite Miszko's requests and grievance for reinstatement with reasonable accommodation. McMahon continued these actions upon taking office by also refusing Miszko's requests and grievance. Regan and McCall also acted improperly by failing and refusing to honor the commitment made to Miszko in 1972 to include him in the P&F system with a 1968 start date and by unconstitutionally impairing his contract with the State by giving him a lesser retirement benefit under §363-b, RSSL. They had no right to lessen his benefit. Their actions against Miszko in preventing him from returning to work or from receiving the full benefit he was entitled to are actionable. *Gierlinger v. New York State Police*, 59 Empl. Prac. Dec. P 41,561 (1992 WL 106279 [W.D.N.Y.]). As in *Gierlinger*, Miszko has identified the constitutional rights he claims were interfered with, to wit, see counter statement of facts, pg. 1, par. 1, supra. Also, his rights of due process when he had his vested property right taken without due process of law, his right to be free from discrimination and harassment due to his disability and, under the Amended Complaint, his race and age.

Since this Court must resolve all ambiguities and draw all factual inferences in favor of the non-moving party, *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 249 (2d Cir. 1985), it must deny Defendants motion.

POINT III
42 U.S.C. §§1981 & 1985 CLAIMS ARE STATED

While Miszko's prior counsel unartfully and inadequately drafted the initial Complaint, the Proposed Amended Complaint specifically addresses the fact that Miszko is a white male who has been discriminated against in his employment and retirement contract with the Defendants. The Supreme Court has specifically held that whites can sue whites for discrimination against each other in the making and enforcing of contracts. *St. Francis College v. Al Khazraji*, 481 U.S. 604,

94 L.Ed 2d 582, 107 S.Ct. 2022 (1987). See also, *Hishon v. King & Spalding*, 467 US 69 (1984); *Griggs v. Duke Power Co.*, 401 US 424 (1971), (prohibiting "[d]iscriminatory preference for any [racial] group, *minority or majority*."); *Spiess v. C. Itoh & Co. Inc.*, 408 F. Supp. 916 (1976); EEOC Decision No. 74-31, 7 FEP. 1326, 1328, CCH EEOC Decisions, par. 6404, p. 4084 (1973); *Mc Donald v. Santa Fe Trail Transportation Co. et al*, 427 US 273 (1976).

Also, the Defendants assertions that the claims under the Rehabilitation Act, §§1981, 1983 & 1985 are barred by the statute of limitations must fail as well. Miszko's claims are timely because the Defendants actions are continuous and ongoing violations of the law and the Constitution. The continuing failure by the Defendants to follow the mandates of the law and Constitution allows a Plaintiff to bring an action even after three years from the initial violation. See, *Cash v. Bates*, 301 N.Y. 258; *Toscano v. McGoldrick*, 300 N.Y. 156, 161. See also, *Burke v. Sugarman*, 35 N.Y.2d 39, 45 and *Finkelstein Memorial Library v. Central School District No. 2*, 34 A.D.2d 781 (2d Dept.).

Since the conspiracy perpetrated on Miszko and countless hundreds or thousands of other State Troopers is continuing and ongoing, there is no statute of limitations problem. While Defendants argue that the Complaint is too "diffuse and expansive" to meet minimum levels of pleading specificity, that argument is without merit. The Complaint amply demonstrates the manner and method of the conspiracy against Miszko, to wit, how he was denied an opportunity to return to work, how he was forcibly retired by the unilateral actions of the Superintendent of State Police, how the Comptroller conspired with the other defendants to prevent Miszko, and others, from receiving their contractual benefits, i.e., §363, RSSL retirement benefits instead of §363-b, RSSL benefits, and how he was repeatedly rebuffed when he attempted to gain that which he was owed. Even when he attempted to file for §363, RSSL, accidental disability retirement benefit through §363-c, RSSL, Miszko felt the

conspiratorial noose tighten around his neck. The Defendants have acted with impunity to Miszko's detriment. This Court may be Miszko's last chance for justice to prevail.

The Proposed Amended Complaint further amplifies the pleadings and also fleshes out the class action aspect of this action. Miszko was a member of the Kingston Police Department and the NYS Department of Correctional Services prior to becoming a State Trooper. As such, he retained his Tier 1 status based on his prior police service and mandatory membership in the P&F and the transfer of his Correctional Services (ERS) time to P&F upon becoming appointed to the Division of State Police in 1973. Despite this fact, the defendants ironically conceded that Miszko received a permanent accidental disability and was granted partial Tier 1 benefits, i.e. thirty (30) days accumulated vacation credit, but was denied the 75% pay monies that is part and parcel of the accidental disability benefit currently available to other Tier 1 members of both the P&F and ERS (despite the several letters from State officials who verified that he would be considered a pre-1972 member of the P&F). The defendants cannot have it both ways by claiming that an accidental disability retirement is subject to either the 75% or 50% pay benefit in light of §363 of the RSSL. The aforementioned laws do not provide for such disparate treatment and selective diminishment of contractual retirement benefits.

Plaintiff, Miszko, and other similarly situated State Troopers are being treated as "Tier 1 1/2" members (for which there is no such category) or, alternatively, as new Tier 2 members (who are not eligible for accidental disability benefits) when they became State Troopers after 1972.

During the 1970's (and continuing to date) the New York State Police has absorbed various members of the Parkway Police and other Departments unto itself. Despite the fact that those Parkway Police Officers who were absorbed into the State Police became Troopers with no break in service, they are treated as post 1972 employees for purposes of §§363 and

363-b, RSSL. Thus, through no fault of their own, these individuals have detrimentally relied on false assertions promulgated by defendants and seen their retirement contracts impaired and diminished without due process and in violation of their Constitutional rights. This is clearly actionable and calls out for injunctive relief to prevent this continuing wrong and blatant disregard of both federal and state laws and constitutions.

Therefore, since the Defendants actions against Miszko (and all other similarly situated employees) continued well past 1990 and 1991, they certainly fall within the three year statute of limitations period.

POINT IV
THE RETIREMENT BENEFIT CLAUSES DO STATE A CAUSE OF ACTION

When the defendants denied Miszko a *separate and distinct* §363, RSSL, 75% pay accidental disability retirement, they unconstitutionally diminished his contract with P&F established when he became a member of P&F on June 26, 1968 as a Kingston Police Officer. The enactment of §363-b, RSSL impermissibly altered Miszko's contract by denying him the benefits he would have enjoyed, i.e. §363, RSSL. While the Defendants claim that Miszko and all other State Troopers became bound to §363-b by the enactment of said law in the "Laws 1971 c. 684", this is untrue. If one reads the bill jacket and the Laws of 1971 (copy annexed hereto) one will find that §363-b was only to apply to members of the State Police in the title of Lieutenant or higher as a result of collective negotiations by the Civil Service Employees Association, Inc. ("CSEA"), the bargaining agent for those superior officers, and the State (See Governor's Program Bill). The May 23, 1971 Senate Bill specifically stated that §363-b would not apply to members of the State Police in the unit certification of PERB dated December 29, 1970 in case numbers C-0570 and C-0575.

Those case numbers were for State Troopers. The Laws of 1971, c. 684, §28 reads in pertinent part as follows:

> "The provisions of sections twenty-three, twenty-four, twenty-five and twenty-seven of this act shall not be applicable to a member of the division of state police who is in the employer-employee negotiating unit defined in the certification of the public employment relations board dated December twenty-ninth, nineteen hundred seventy in case numbers C-0570 and C-0575"

It was not until 1972 that legislation was passed, out of necessity, making the provisions of §363-b, RSSL applicable to members of the State Police below the rank of Lieutenant for the express purpose of avoiding the disparate treatment of Officers and Troopers. (See attached letters from then Superintendent William E. Kirwan, dated May 23, 1972 and from Counsel for the NYS Police, PBA, Hinman, Straub, Pigors and Manning, dated May 25, 1972, as an appendix hereto.) Even at that late date, the effect of the legislation was to diminish the contractual benefit Miszko previously enjoyed with the Kingston Police Department and P&F, the New York State Department of Correctional Services and ERS, without providing him due process. This impairment and diminishment of Miszko's constitutionally protected retirement benefit was also a violation of the equal protection clause to which he was entitled to while members of the State Police who had been Police Officers in P&F (albeit as State Troopers) prior to 1972 were receiving §363 RSSL benefits. Miszko, who also was a Police Officer in P&F prior to 1972, was denied the above benefit. There should be no distinction made as between these two groups. Both were entitled to §363, RSSL benefits prior to May 30, 1972 and now with the stroke of a pen, one group saw

its contractual rights to accidental disability benefits literally eliminated.

The New York State Constitution, Article V, §7, states the following:

> "[a]fter July 1, 1940, membership in any pension or retirement system of the state or of a civil division thereof shall be a *contractual* relationship, the benefits of which shall not be diminished or impaired." (emphasis added).

Thus, the State recognizes that Miszko had a contractual relationship and that his benefits could not be diminished or impaired but, nevertheless, eliminated his right to §363, RSSL, 3/4 pay accidental disability retirement benefits.

In *Birnbaum v. N.Y.S. Teachers Retirement Sys.*, 5 N.Y.2d 1, 176 N.Y.S.2d 984, the Court of Appeals found that Article V, §7 was to be read into the retirement contracts with public employees such as Miszko. In *McDermott et al v. Regan et al*, 82 N.Y.2d 354, 604 N.Y.S.2d 890 (1993), the Court of Appeals specifically held that Chapter 210 of the Laws of 1990 unconstitutionally diminished and impaired the contractual rights of members of the Retirement System when the State enacted a law changing the method of funding the retirement system (copy of brief on behalf of *McDermott et al* is annexed hereto). There is, therefore, case law to support the proposition that legislation that diminishes or impairs one's contractual benefits with a retirement system is unconstitutional. See also, *Allied Structural Steel Co. v. Spannaus*, 438 US 234 (1978), (Court held that "If a State could reduce it's financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the contract clause would prove to be no protection at all. Contractual obligations, once fixed, should not be retroactively upset by legislative action."), *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977), (Court will closely scrutinize a State's attempt to escape from it's financial

obligations.); *Castellano v. Board of Trustees*, 937 F.2d 752 (2nd Cir. 1991); *Energy Reserves Group Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983); *3A Corbin, Contracts*, §626, P. 10 (1960). See also, *Harris v. Nassau County Dept of Social Services et al*, 73 N.Y.2d 886, 538 N.Y.S.2d 241, 535 N.E.2d 294 (Court held provisions of Collective Bargaining Agreement cannot be retroactively applied to take away a benefit from an employee). As stated at paragraph 12 of the Miszko affidavit, Miszko was an existing member of P&F and ERS, therefore, §363-b RSSL could not legally be made to retroactively apply to his membership and provide him with a lesser benefit even if it had been collectively negotiated. Therefore, this Honorable Court should not condone retroactive impairment of contracts. This Court can make §363-b, RSSL constitutional by changing four words, to wit: change: "*service in the division* prior to May thirtieth, nineteen hundred seventy-two" to read: "*member of the P&F retirement system* prior to..."

Moreover, there certainly is no statute of limitations with regard to unconstitutional actions and Miszko is clearly entitled under the U.S. Constitution, Article I, §10, as well as under the First, Fourth, Fifth, Ninth and Fourteenth Amendments thereto to a declaration from this Court that §363-b, RSSL as applied to him and others similarly situated is unconstitutional.

A. THE CLAIMS ARE NOT PRECLUDED BY THE FINAL JUDGMENT IN *MISZKO V. REGAN.*

While Miszko attempted to fully litigate to judgment his claims that §363-b does not apply to him, he has not litigated his federal claims that §363-b and §363-c, subd. h., RSSL are unconstitutional as they apply to him and others similarly situated. Also, res judicata does not apply inasmuch as a *damage* claim could not have been asserted in Miszko's first forum. In *Lawrence v. McGuire*, 651 F. Supp. 312, 316 (S.D.N.Y. 1987), the District Court recognized that damages cannot generally be recovered in an Article 78 proceeding and

thus, plaintiff's damage claims could not have been asserted in the first forum. Since Miszko's prior litigation, in State Court, was via an Article 78 proceeding, his federal damage claims are not precluded.

Furthermore, collateral estoppel only applies where issues were *actually litigated* and determined in the prior suit and necessary to the judgment entered in that suit, so long as the party against whom the doctrine is invoked had a *full and fair opportunity to litigate the issues* in the previous action. See *Lawrence,* supra, and *Winters v. Lavine*, 574 F.2d 46, 66 (2d Cir. 1978).

Thus, the applicability of issue preclusion to a federal suit depends on whether the issues were fully and fairly litigated in Miszko's Article 78 proceeding. In the State Court proceeding, the claimed issues were that:

1) the denial of retirement benefits violated Article V, §7 of the New York Sate Constitution;
2) the retirement system should have been estopped to deny its prior assertions that Miszko was entitled to the benefits sought. See *Curry v. U.S. Postal Service*, 583 F. Supp. 334 (D.C. Ohio 1984).
3) briefly, in passing, a slight mention that the denial of benefits violated the Contract Clause of Article I, §10 of the federal Constitution.

The issues of due process, equal protection and impairment of contract were only mentioned in passing with no elaboration or citations to authorities. A mere passing reference to constitutional issues is insufficient to preclude litigation of the issues in a subsequent suit on the basis of collateral estoppel. The discussion of the issues sought to be precluded must have been accompanied by "elaborations or citations of authority". *Montagna v. O'Hagan,* 402 F. Supp. 178, 182 (E.D.N.Y. 1975).

Since Miszko does not now seek to relitigate his State Law causes of action, but rather is litigating fresh, federal causes of action, the State Court judgment is of no moment to the instant litigation (it should also be noted that the Court of Appeals

ruled in favor of *McDermott*, supra, that the State had violated Article V, §7 shortly after it had denied Miszko permission to appeal the Appellate Court decision in his Article 78 proceeding alleging an Article V, §7 violation with respect to §363-b, RSSL.) This inconsistency by the State Court of Appeals further underscores the need to allow this Court a fresh look at the Constitutionality of what has befallen Miszko.

While counsel for the Defendants is correct in his statement that if Miszko prevailed in his State Court action, §363-b, RSSL would have been declared unconstitutional; he fails to state that it would have been unconstitutional under both the New York State and federal Constitutions. No full development of federal constitutional issues, presented herein, was effectuated in the State Court proceeding.

POINT V
THE THIRD CAUSE OF ACTION STATES A CLAIM

Under the analysis provided earlier concerning the ongoing and continuous consequence of the discrimination visited upon Miszko, his Rehabilitation Act and ADA claims are timely. The pleadings make clear that Miszko was forced to retire due to his disability and the Defendants failure to make reasonable accommodations for him. The mere fact that the Superintendent had unilaterally filed for Miszko's retirement does not preclude the State Police from reinstating Miszko as a State Trooper with a reasonable accommodation to his disability. Their failure to do so, in addition to not acting on his grievance, is an ongoing and continuous consequence and brings a fresh cause of action with each passing day. Similarly, while the Defendants claim that the ADA became effective on July 26, 1992, two years after Miszko's forced retirement, they fail to acknowledge that the State Police could have acceded to Miszko's request to be employed as a State Trooper with a reasonable accommodation. As such, his Equal Employment Opportunity Commission ("EEOC") complaint was timely, he

filed this suit while a substantial weight review was being undertaken by the EEOC (a decision was not made on the substantial weight review until late 1995), and in any event, under Title II of the ADA, he did not even have to file with the EEOC before commencing an ADA action against a public entity such as the Defendants.

Finally, the status of Miszko's disability position in his State Court Article 78 proceeding is not inconsistent with his claims herein. Yes he is "permanently disabled" as the result of an accidental injury and yes he cannot perform the full duties of a State Trooper. However, Miszko never claimed that he was unable to perform some of his prior duties, just that he cannot perform all of them without reasonable accommodation. It is not necessary under the ADA or the Rehabilitation Act that the employee be able to perform all of the duties of his position, just that he or she be able to perform the essential functions of the position with reasonable accommodation made for his or her disability. Had the State Police made an attempt to make a reasonable accommodation to Miszko, he would have been able to attempt to perform the essential duties of his job and avail himself of promotional opportunities. There are plenty of "light duty" or administrative positions he could have been assigned or promoted to that have been afforded other members in situations similar to Miszko's. The fact that the State Police and the Superintendents of the State Police have made a carte blanche statement that they will make absolutely no accommodation to Miszko or any other injured Trooper is evidence enough of discrimination in violation of the ADA and the Rehabilitation Act.

POINT VI
CLASS ACTION STATUS SHOULD BE GRANTED

As stated in Miszko's affidavit and in the Proposed Amended Complaint, the Defendants actions are widespread both with regard to the unconstitutional application of §363-b RSSL and

with the State Police and the Superintendents' position that they will make no accommodation to any injured State Trooper. As such, Miszko's claims are typical of the class of Troopers sought to be represented. Class action is the superior method of adjudication because judicial economies are not met by a myriad of litigations by hundreds or thousands of members of the State Police. Since the claims of each member are similar to Miszko's it makes sense to consolidate for decision all the claims, thus avoiding conflicts between the Districts.

POINT VII
THE PROPOSED AMENDED COMPLAINT SHOULD BE APPROVED

The FRCP allow for the amendment of pleadings in situations such as the present whereby any perceived defects need correction in order to have a full and fair adjudication on the merits. There is no prejudice to the Defendants to permit amendment to the Complaint and the amendment allows for a cleaner, more precise statement of the issues to be fully and fairly litigated. As such, it is to the benefit of this Honorable Court and all parties to allow this amendment to the Complaint.

CONCLUSION

By reason of all of the foregoing, the Defendants motion to dismiss must be denied in its entirety and the Plaintiff's cross motions to amend the Complaint and for Class Action status must respectfully be granted in their entirety.

Dated: March, 1996
Mineola, N.Y.

Respectfully submitted,
GABA & STOBER, P.C.

By:

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E-56

292a
Governor's Program Bill (Pages 292a-300a)

L.1971 C.684
6968-A

1971-1972 Regular Sessions

IN SENATE

May 23, 1971

Introduced by COMMITTEE ON RULES—read twice and ordered printed, and when printed to be submitted to the Committee on Finance—committee delivered, bill amended, ordered reprinted as amended and resubmitted to said Committee.

AN ACT

To amend the executive law, the retirement and social security law, the civil service law, the military law and the state finance law, in relation to salaries, retirement benefits, relocation allowances and reimbursement for property damage for certain members of the state police and repealing certain provisions of the executive law relating to salary schedules and computation of salaries.

Dated: June 22, 1971

New York State Library
Microfilmed
Date: 9/2/71
No. of printed bills: 1
No. of exposures exclusive of bills: 10

Received:
10/19/91
3 of 3

E-57

293a

PROGRAM BILL #114

REVISED

GOVERNOR'S PROGRAM BILL

1971

S. Int. 696SA

A. Int. *(crossed out)*

MEMORANDUM

RE: AN ACT to amend the executive law, the retirement and social security law, the civil service law, the military law and the state finance law in relation to salaries, retirement benefits, relocation allowances and reimbursements for property damage for certain members of the state police and repealing certain provisions of the executive law relating to salary schedules and computation of salaries.

Purpose of the Bill:

To provide salary and fringe improvements for officers of the Division of State Police in accordance with a collectively negotiated settlement between the State and The Civil Service Employees Association, Inc., covering the officer negotiating unit. The officers in such units have ratified the settlement.

Summary of Provisions of the Bill:

a. Salaries.

For those in the negotiating unit composed of lieutenants and captains, salary increases which will result in:

- three flat salary rates for lieutenants and captains on April 1, 1971,

- one flat salary rate for each of the officer ranks on April 1, 1972, and
- a flat $200 increase to be effective October 1, 1972.

The bill would also substitute for the present longevity and extra longevity salary increments a longevity concept under which those in the unit would receive $400 more in their tenth year of service and an additional $400 in their fifteenth year of service.

(294a) Majors, the only management personnel who did not receive an increase under the 1970 legislative salary provisions because they were then still in a negotiating unit, would receive (effective April 1, 1971) an increase equivalent to the $250 raise provided other State employees in October, 1970, plus a six percent increase.

b. Disability.

A new disability benefits program would be established to replace two existing ones. At present, an accidental disability pension of three quarters of final average salary is paid to members disabled as a result of a service-connected accident; there is no length of service requirement. For all other disabilities, the ordinary disability allowance is proportioned to length of service, but with a minimum of one third of final average salary payable to those with ten or more years of service. Any workmen's compensation benefit paid serves to reduce the accidental disability pension but not the ordinary disability benefit.

Under the new plan:

(a) Disabled employees whose disabilities were service-connected would be eligible to retire without regard to length of service while all others would be eligible after

five years of member service in the Division of State Police.

(b) In terms of the benefit levels, the distinction between disabilities which resulted from accidents, incidents and diseases would be eliminated.

(c) In all cases the benefit would be one-half of final average salary.

(d) Any workmen's compensation benefit would be payable in addition.

(e) The sum of the disability benefit, the supplemental retirement allowance, workmen's compensation, and the disability benefit provided under social security (exclusive of any social security benefits payable to spouse and children of the disabled) would be limited to the salary payable on a current basis for the job held by the pensioner at the time of disability.

(f) The legislation would be temporary, expiring March 31, 1973.

(295a)c. Retirement.

The following benefits essentially conform to benefits provided to other State employees:

(1) Retirement credit would be given for all service, including that which constitutes less than a full year; at present, service of less than a full year is not counted toward retirement.

(2) The present 30-year ceiling on retirement credit under the 20-year plan would be eliminated; credit would be given for all years of service, with the maximum pension limited to 75 percent of final average salary.

(3) Retirement credit would be given on a day-for-day basis for accumulated sick leave, up to a maximum of 165 days.

4) The $2,000 survivor's benefit presently payable to beneficiaries of retired members of the State Police would be increased to $3,000 on behalf of those who retire on or after April 1, 1971.*

5) Those eligible for retirement credit for certain military service but who failed to make a timely claim would be given an additional opportunity to obtain credit for such service by initiating payment on or before March 31, 1972.

6) Those in the closed 25-year half-pay plan would be given until March 31, 1972 to elect the new 20-year retirement plan.

d. Other improvements.

1. Relocation allowance.
The present relocation allowance paid when a member of the State Police is required to move because of a promotion or change in assignments, of two percent of annual compensation with a maximum of $400, would be raised to three percent, with a maximum of $600, applicable for those in the rank of lieutenant and above.

(296a) 2. Reimbursement for property damage.
An officer of the State Police who suffers a loss because of damage to his personal property as a result of actions unique to police duties would be eligible for reimbursement for such loss pursuant to existing procedures established under the State Finance Law not applicable to other groups of State employees.

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* Applies to officers in the negotiating unit; management was previously granted this benefit. The remaining retirement benefits would also be extended to management.

Statement in Support of the Bill:

The bill would implement portions of the recently negotiated settlement between the State and The Civil Service Employees Association, Inc., representing the negotiating unit of lieutenants and captains. Such officers have ratified the settlement. The bill also makes adjustments for majors who were not included in the appropriate 1970 legislative salary provisions.

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297a

S-69108-A-

STATE DEPARTMENT OF CIVIL SERVICE

June 26, 1971

SENATE
6968-A Introduced by Committee on Rules

RECOMMENDATION: No objection

STATUTES INVOLVED: Executive Law § 215(1)(a)(11), ff.

EFFECTIVE DATE: April 1, 1971

DISCUSSION:

This bill implements a negotiated agreement between the State and representatives of the officers of the Division of State Police (CSEA). The bill specifies new salary schedules, sets standards for salary increments, describes revised retirement benefits, grants relocation allowances, and provides reimbursement for damage to personal property.

We detect no defects requiring us to recommend the measure's disapproval. We do, of course, place heavy reliance on the negotiating parties to arrive at language to accurately reflect their intentions.

(Ersa H. Poston signature)
Ersa H. Poston
President, Civil Service Commission

Attachment

E-63

298a

NEW YORK STATE POLICE
State Campus
Albany, N.Y. 12220

William E. Kirwan
Superintendent

June 15, 1971

SENATE:	6968-A
ASSEMBLY:	
INTRODUCED BY:	Committee on Rules
RECOMMENDATION:	Approval
STATUTE INVOLVED:	Executive Law, Sections 215, 216, 216-b, 216-c; Retirement and Social Security Law, Sections 341, 381-b; Civil Service Law, Section 155; Military Law, Section 243; State Finance Law, Section 6-d
EFFECTIVE DATE:	April 1, 1971

DISCUSSION:

1. Purpose of bill:
   To amend the Executive Law, the Retirement and Social Security Law, the Civil Service Law, the Military Law and the State Finance Law, in relation to salaries, retirement benefits, relocation allowances and reimbursement for property damage for certain members of the State Police and repealing certain provisions of the Executive Law relating to salary schedules and computation of salaries.

2. Summary of provisions of bill:
Sets salary rates for officer members of the State Police and makes some changes in retirement and disability law sections pertinent to such personnel.

(299a) NEW YORK STATE POLICE

3. Prior legislative history of bill:
None known.

4. Known position of others respecting bill:
None known.

5. Budget implications:
Bill includes salary increases for limited number of persons.

6. Arguments in support of bill:
This bill is the result of negotiation with the Police Benevolent Association of the New York State Police, Inc., covering Lieutenants and Captains, and of the removal of Majors of the New York State Police from that Associations bargaining, which Majors did not receive any salary increases in 1970.

7. Arguments in opposition to bill:
None.

8. Reasons for recommendation:

s/W.E. Kirwan
Superintendent

E-65

300a

30-DAY BILL
BUDGET REPORT ON BILLS
Session Year: 1971

SENATE: No. 6968-A
INTRODUCED BY: Committee on Rules
ASSEMBLY:
Law:
Executive
Sections: 215, 216 (various subds.) 216-b, 216c
Retirement and Social Security
Sections: ___sub, ___(various subds.) 363-b(new)
Military
Sections: 243, sub. 4
State Finance
Sections: 6-c (renumbered), sub. 2
Civil Service
Sections: 155, sub. 2-a

Division of the Budget recommendation on the above bill:
Approve_y_ Vote:___No Objection___No Recommendation___

Note: (handwritten) See also Budget memo on S. 6992.

1. Subject and Purpose and Summary of Provisions:
S. 6968-A would provide salary and fringe benefit improvements for lieutenants and captains in the Division of State Police in accordance with a collectively negotiated settlement between the State and the Civil Service Employees' Association, covering the officer negotiating unit. In addition, salary raises would be provided for majors, the only management personnel who did not receive an increase under the State's 1970 salary bill, and certain

improvements in retirement benefits would be provided for all management personnel in the Division of State Police who are members of special service pension plans. S. 6992 corrects a technical error in the first measure.

2. Budget Implications: Based on a projection of the present staffing, these measures will require a cash expenditure during 1971-72 of approximately $133,000, of which approximately $7,000 will be on a first instance basis. The new retirement benefits are anticipated to cost 1.2 per cent of payroll and will be first payable in 1973-74.

3. Recommendation: These bills would provide middle management members of the State Police with reasonable salary increases and benefit improvements which take into consideration the State's difficult financial situation as well as the needs of its employees during a period of continuing inflation. Two provisions are particularly desirable from the standpoint of the State: the complete elimination of automatic salary increments, to be effective April 1, 1972, and the establishment of a new disability benefit designed to provide reasonable compensation to those who must leave work due to disability and thus reduce pressure for related benefits which can be subject to considerable abuse (e.g., full pay provisions comparable to those for municipal policemen and firemen, heart bills comparable to those for city policemen and firemen). The bills, which are part of the Governor's program, are necessary to implement a collectively negotiated agreement and we recommend that they be approved.

Date: June 16, 1971
Examiner: *(Jeremy P. Schrauf signature)*
Jeremy P. Schrauf

Bill Jacket and Laws of 1972 (Pages 301a-310a)

Laws of New York, 1972
CHAPTER 635*
(Pages 2057-2059)

AN ACT to amend the retirement and social security law and chapter six hundred eighty-four of the laws of nineteen hundred seventy-one entitled, "An Act to amend the executive law, the retirement and social security law, the civil service law, the military law and the state finance law, in relation to salaries, retirement benefits, relocation allowances and reimbursement for property damage for certain members of the state police and repealing certain provisions of the executive law relating to salary schedules and computation of salaries", in relation to certain retirement

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* Fiscal Note - Pursuant to section 50 of the Legislative Law.

1. Withdrawal of excess contributions. There would be no cost to the State of New York because the amounts withdrawn would be employee contributions.
2. Disability benefits for certain members of the New York State Police. The estimated annual cost of this benefit is $20,000.
3. Transfer of civilians from State Police Plan to Career Retirement Plan. The maximum cost of this to the State of New York is estimated to be $1,500 per annum.
4. Transfer from Regional Park Police Plan to Career Retirement Plan. The maximum cost of this to the State of New York is estimated to be $10,000 per annum.
5. Purchase of credit for service with Federal War Manpower Comission. The estimated one-time cost of this to the State of New York is approximately $950 for each year of service credit purchased.

The Actuaries for the State Employees' Retirement System and the State Policemen's and Firemen's Retirement System are the sources of the above estimates.

Explantation—Matter in *italics* is new, matter in [ ] is old law to be omitted.

benefits, transfers, withdrawals and credits for certain state employees.

Became a law May 30, 1972, with the approval of the Governor. Passed on message of necessity pursuant to article 111, section 14 of the Constitution by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty-one of the retirement and social security law is hereby amended by adding thereto a new subdivision, to be subdivision k. to read as follows:

k. A member in the employ of the state who retires prior to April first, nineteen hundred seventy-three may elect to withdraw his excess contributions at the time of his retirement. Such election shall be duly executed and filed with the comptroller. The term excess contributions shall mean accumulated contributions in excess of the amount thereof necessary to provide the required pension or retirement allowance specified under the plan applicable to the member. In no case shall such withdrawal of contributions result in an increase in the pension benefit.

§ 2. Section three hundred twenty-one of such law is hereby amended by adding thereto a new subdivision, to be subdivision k, to read as follows:

k. A member in the employ of the state who retires prior to April first, nineteen hundred seventy-three may elect to withdraw his excess contributions at the time of his retirement. Such election shall be duly executed and filed with the comptroller. The term excess contributions shall mean accumulated contributions in excess of the amount thereof necessary to provide the required pension or retirement allowance specified under the plan applicable to the member. In ***(302a)*** *no case shall such withdrawal of contributions result*

in an increase in the pension benefit. The provisions of this subdivision shall not apply to a member of the state police in collective negotiating units established pursuant to article fourteen of the civil service law.

§ 3. Subdivision i of section eighty-nine of such law, as added by chapter four hundred fifty-seven of the laws of nineteen hundred seventy, is hereby amended to read as follows:

i. Notwithstanding any provisions of subdivisions a, b or h of this section to the contrary, a member who is in the collective negotiating unit designated as the security services unit and established pursuant to article fourteen of the civil service law and who has elected or is required to contribution accordance with this section may, on or before March thirty-first, nineteen hundred [seventy-one] *seventy-three*, elect to come under the provisions of section seventy-five-h of this article. Such election shall be duly executed and filed with the comptroller.

§ 4. Section three hundred eighty-one of such law is hereby amended by adding thereto a new subdivision, to be subdivision i, to read as follows:

i. Notwithstanding any provisions of subdivision b of this section to the contrary, an employee who is required to contribute in accordance with this section, but is not a member of the state police, may, on or before March thirty-first, nineteen hundred seventy-three, elect to come under the provisions of section seventy-five-h of this chapter. Such election shall be duly executed and filed with the comptroller.

§ 5. Subdivision j of section three hundred eighty-three of such law, as added by chapter four hundred fifty-seven of the laws of nineteen hundred seventy, is hereby amended to read as follows:

j. Notwithstanding any provision of subdivision b, c or i of this section to the contrary, a member who is in the collective negotiating unit designated as the security services unit and established pursuant to article fourteen of the civil service law and who has elected or is required to contribute in accordance with this section may, on or before March thirty-first, nineteen

hundred [seventy-one] *seventy-three,* elect to come under the provisions of section three hundred seventy-five-h of this article. Such election shall be duly executed and filed with the comptroller.

§ 6. Subdivision i of section three hundred eighty-three-a of such law, as added by chapter four hundred fifty-seven of the laws of nineteen hundred seventy, is hereby amended to read as follows:

i. Notwithstanding any provision of subdivision a, b or h of this section to the contrary, a member who is in the collective negotiating unit designated as the security services unit and established pursuant to article fourteen of the civil service law and who has elected or is required to contribute in accordance with this section may, on or before March thirty-first, nineteen hundred [seventy-one] *seventy-three,* elect to come under the provisions of section three hundred seventy-five-h of this article. Such election shall be duly executed and filed with the comptroller.

§ 7. Subdivision a of section three hundred sixty-three-b of such law, as added by chapter six hundred eighty-four of the laws of nineteen hundred seventy-one, is hereby amended to read as follows:

a. Every member or officer of the division of state police in the executive department who becomes physically or mentally incapacitated for the performance of duty prior to April first, nineteen hundred seventy-three shall be covered by the provisions of this section in lieu of the provisions of section three hundred sixty-two or three hundred sixty-three of this article; except, however, any such member or officer who last entered or reentered service in the division prior to April first, nineteen hundred seventy-one, *or, in the case of a member in a collective negotiating unit consisting of members of the state police below the rank of lieutenant and established pursuant to article fourteen of the civil service law, last entered or reentered service in the division prior to the effective date of this act,* shall be entitled to apply for disability retirement

pursuant to such sections and to receive the benefit so payable in lieu of the benefit payable pursuant to this section.

§ 8. Section twenty-eight of chapter six hundred eighty-four of the laws of nineteen hundred seventy-one, entitled "An act to amend the executive law, the retirement and social security law, the civil service law, the military law and the state finance law, in relation to salaries, retirement benefits, relocation allowances and reimbursement for property damage for certain members of the state police and repealing certain provisions of the executive law relating to salary schedules and computation of salaries", is hereby amended to read as follows:

§ 28. The provisions of sections twenty-three, [twenty-four,] twenty-five and twenty-seven of this act shall not be applicable to a member of the division of state police who is in the employer-employee negotiating unit defined in the certification of the public employment relations board dated December twenty-ninth, nineteen hundred seventy in case numbers C-0570 and C-0575.

§ 9. Retirement credit for certain state employees. A member of the New York state employees' retirement system who was in the employ of the state on March thirty-first, nineteen hundred seventy who was transferred to the employ of the federal war manpower commission when the state employment service was federalized during world war II and who returned to state service when the state employment service was returned to state control and who was ineligible to obtain retirement credit for service with such commission pursuant to the provisions of section thirty-three of chapter four hundred fifty-seven of the laws of nineteen hundred seventy because he was not in the employ of the state division of employment on March thirty-first, nineteen hundred seventy may obtain retirement credit for his period of service with such commission by depositing in such retirement system an amount equal to the contributions he

EXPLANATION - Matter in *italics* is new, matter in brackets [ ] is old law to be omitted.

would have made during such period had he been a state employee, with regular interest. Such deposit must be made on or before March thirty-first.

E-73

304a
Bill Jacket
C. 635, L. 1972

Chapter 635
12392

IN ASSEMBLY
May 9, 1972

Introduced by Committee on Rules - read once and referred to the Committee on Rules

AN ACT

To amend the retirement and social security law and chapter six hundred eighty-four of the laws of nineteen hundred seventy-one entitled, "An Act to amend the executive law, the retirement and social security law, the civil service law, the military law and the state finance law, in rela.. to salaries, retirement benefits, relocation allowances and reimbursement for property damage for certain members of the state police and repealing certain provisions of the executive law relating to salary schedules and computation of salaries", in relation to certain retirement benefits, transfers withdrawals and credits for certain state employees.

Approved:

New York State Library, Microfilmed
Date: 6/26/__
No. of printed bills: 1
No. of exposures exclusive of bills: 11

May 23, 1972

STATE DEPARTMENT OF CIVIL SERVICE

ASSEMBLY: (illegible)	Introduced by Rules Committee
RECOMMENDATION:	No objection
STATUTES INVOLVED:	Retirement and Social Security Law §§ 21(k) (new), 321(k) (new), 89(i), ff.
EFFECTIVE DATE:	Immediately

DISCUSSION:

This bill would implement negotiated agreements between the State and appropriate employee representative organizations. Specifically, the bill would allow: 1) the withdrawal of excess contributions by most State Employees' Retirement System and Policemen's and Firemen's Retirement System members at the time of retirement; 2) a reopener whereby uniformed correction personnel, civilian personnel of the State Police and employees of the Regional State Park Police may, on or before March 31, 1973, elect to join the career retirement plan for State employees (new plan); 3) State Police members below the rank of lieutenant who last entered or reentered service prior to the effective date of this measure, to apply for disability benefits under Retirement and Social Security Law Sections 362 and 363 in lieu of Section 363-b; and 4) purchase of credit for service with the Federal War Manpower Commission by those employees who were so federalized during World War II and then returned to State service. (Two years ago, those employees of the State Division of Employment who had been federalized and worked with the War Manpower Commission and returned to the Division of Employment after the war were given an opportunity to purchase credit for their federalized service. However, those who left the Division of Employment for another State agency did not receive this opportunity. This bill

would allow the latter employees to purchase credit for their federalized service.)

We detect no defects requiring us to recommend disapproval. We do, of course, place heavy reliance on the negotiating parties to arrive at language to accurately reflect their intentions.

(Ersa H. Poston signature)
Ersa H. Poston
President, Civil Service
Commission

Attachment

306a

State of New York
Executive Department
PERMANENT COMMISSION ON PUBLIC EMPLOYEE
PENSION AND RETIREMENT SYSTEMS
Third Avenue
New York, New York 10022
Phone: illegible

Otto Kinzel, Chairman
Joseph J. Burns
Harold A. Conroy
James P. Murray
Carl L. Stevenson

Joseph G. Metz
Executive Director

May 17, 1972

The Honorable Michael Whiteman
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: Assembly Bill No. 12

Dear Mr. Whiteman:

Enclosed please find copy of the Commission's memorandum #120 on A 12392, now before the Governor.

This memorandum was previously filed with the Legislature The view of the Commission on this bill has not changed, and we have no objection to the Executive approval of the bill.

Sincerely,
(Otto Kinzel signature)

State of New York
Executive Department
PERMANENT COMMISSION ON PUBLIC EMPLOYEE
PENSION AND RETIREMENT SYSTEMS
Third Avenue
New York, New York 10022
Phone: illegible

Otto Kinzel, Chairman
Joseph J. Burns
Harold A. Conroy
James P. Murray
Carl L. Stevenson

Joseph G. Metz
Executive Director

May 11, 1972

Senate Bill No. 10554
Assembly Bill No. 12392

Summary of Provisions of the Bill:

This bill would make the following changes affecting pension benefits:

- Correction officers and state park policemen, would be permitted to elect coverage under the career pension plan available to other state employees.
- Civilian employees of the Division of State Police, presently in a "closed" twenty-five year plan, would be given the right to elect coverage under the career pension available to other state employees.
- Certain state employees who were employed by the Division of Employment when that division was "federalized" during World War II would be permitted to

purchase service credit for the period of such federalization.

- Employees would be permitted to withdraw excess contributions at retirement.
- Certain members of the State Police would be included under a new disability retirement program.

Recommendations: While the Commission has reservations concerning the provisions of the bill which would give members of the correction department and state park police the right to elect coverage under the career pension plan, it notes that the bill really only extends an existing benefit, first enacted in 1970, until 1973. Therefore, pending its analysis of the public employee pension and retirement system in general, it has no objection to such temporary extension.

(308a) The provisions relating to civilian employees of the Division of State Police only affect those employees who are members of the "closed" twenty-five year plan. Since the bill, in effect, would only permit clerical employees in such plan to elect retirement coverage which generally is available to other clerical employees of the state, and would permit such election only within a one year period, the Commission has no objection thereto.

Another provision to the bill would allow certain state employees to purchase service credit for service with the federal government in a manner similar to that granted to employees of the Division of Employment in 1970. The 1970 Act allowed any state employee who was then employed by the division of employment to purchase service credit.

- for service with the War Manpower Commission when the Division of Employment was "federalized" during World War II, if
- the employee was employed by the Division at the time it was federalized and he immediately returned to state service when control of the Division was returned to the state.

Since only those who were employed by the Division in 1970 were made eligible to purchase such service credit under the prior bill, employees who had transferred to other state departments since 1945 were ineligible. This bill removes this inequity and allows employees presently in state service to purchase such service credit, under the above restrictions.

The bill would also permit employees who retire prior to April 1, 1973 to withdraw excess contributions at retirement.

Finally, the bill would include uniformed members of the Division of State Police under a new disability retirement program presently available to commissioned officers and management personnel. The new program is temporary, expiring on March 31, 1973.

Under present law, a member of the State Police who is disabled as a result of a service connected "accident" receives a disability retirement equal to 75% of final average salary, less any workmen's compensation benefits received. For all other disabilities, the disability benefit is proportioned to length of service, with a minimum benefit of 1/3 of final average salary after 10 years of service.

Under this bill the disability benefit would be a uniform 50% of final average salary, regardless of whether the disability results from a service connected accident or injury, or is non-service connected. The right of members **(309a)** who entered or reentered service prior to April 1, 1971, to the "old" 75% "accident" disability benefit would be preserved.

As proposed, if the disability was not service connected, the member would not be eligible for benefits unless he had at least five years of service. There would be no reduction for workmen's compensation benefits received, but the disability benefit, when added to workmen's compensation benefits, social security disability benefits (exclusive of those for dependents) and the supplemental retirement allowance could not exceed the salary at the time such disability commenced.

These disability provisions were part of an omnibus bill, containing salary and other retirement provisions, which the

Commission previously disapproved (Senate Bill No. 7710; March 17, 1972). The Commission is aware of the need for the revision of the disability retirement provisions now contained in law. The disability benefit program provided under this bill, first recommended by the Moore Commission, would allow the State to gain experience in such a revised program.

In view of the foregoing, and because the program is temporary and would not result in substantial increased costs the Commission has no objection to its enactment.

Based on its analysis, the Commission has no objection to the enactment of the bill.

s/Otto Kinzel
Otto Kinzel, Chairman
Permanent Commission on Public
Employee Pensions and
Retirement Systems

BUDGET REPORT ON BILLS
Session Year 1972

SENATE:
Introduced by: Committee on Rules
ASSEMBLY: No. 12392
Law: Retirement and Social Security
Sections: 21 (new k), 89 (I), 321 (new _), 363-b (_), 381 (i), 353 (j), 383-a (i), 28
Chapter 684, Laws of 1971
Approve: x

1. Subject and Purpose and summary of provisions: To make the following changes in retirement provisions applicable to State employees in the State Employees Retirement System and State Policemen's and Firemen's Retirement System:

a. State employees would be permitted at the time of retirement to withdraw the contributions which they made which are in excess of the amount required to provide their pension or retirement allowance.
b. Members of the Correction Officer and the Regional State Park Police 25-year plans would be given an additional one-year opportunity (to March 31, 1973) to transfer to the Career Retirement Plan.
c. Civilian employees of the State Police who are in the closed 25-year retirement plan would be given a one-time, one-year opportunity (to March 31, 1973) to transfer to the Career Retirement Plan.
d. Certain State employees would be granted a one-time, one-year opportunity (to March 31, 1973) to purchase retirement credit for service with the Division of Employment when that agency was federalized during World War II.
e. Members of the Division of State Police below the rank of lieutenant would be covered by the new temporary

disability benefits program which was made available to other members of the State Police in 1971.

2. Budget implications: The cost of these provisions will vary, depending upon the numbers of persons who take advantage of them. Funds sufficient for this purpose are included in the Supplemental Budget.

3. Recommendation: Enactment of this bill is necessary for the State to fulfill its obligation as a result of collective negotiations with organizations representing employees in six negotiating units. Accordingly, we recommend that this bill be approved.

Date: May 26, 1972
Examiner: *(illegible signature)*
s/Richard Schneider
Richard Schneider

Letters dated May 23, 1972 and May 25, 1972
(Pages 311a-313a)

NEW YORK STATE POLICE
State Campus
Albany, N.Y. 12220

William E. Kirwan
Superintendent

May 23, 1972

SENATE:	
ASSEMBLY:	12392
INTRODUCED BY:	Committee on Rules
RECOMMENDATION:	Approval
STATUTE INVOLVED:	Executive Law Retirement and Social Security Law Civil Service Law State Finance Law
EFFECTIVE DATE:	Immediately

DISCUSSION:

1. Purpose of bill:
   Amend various laws to provide benefits obtained through negotiations with employee organizations.
2. Summary of provisions of bill:
   In relation to State Police, permits civilian employees to elect standard State benefits of 55 year State Police retirement plan and removes exclusion of State Police members in the ranks below Lieutenant from the provisions of the new disability plan.
3. Prior legislative history of bill:

Disability retirement has been included in three other bills in the Legislative session.

4. Known position of others respecting bill:
   Bill is supported by employee organizations that negotiated and presumably of Office of Employee Relations who participated in the negotiations.
5. Budget implications:
   Explained in physical note attached to bill.

312a NEW YORK STATE POLICE

Arguments in support of bill:
Certain civilian career employees of the Division are permitted by this bill to elect the retirement plan that existed for Division members. The election does not permit the twenty year retirement plan. It permits retirement at age 55 and does add certain limited benefits for those few employees who are able to so elect.

I have written extensively in relation to other Legislation of the need for the new disability retirement plan for Division members below the rank of Lieutenant. During the first negotiation between PBA and State Police a provision was incorporated ___ the contract that prevented separation from the Division ___ a service incurred injury resulting in total disability except by accidental disability retirement. It was then agreed that during the life of that first contract a new plan would be studied to fully cover all of the service incurred total disability problems of the Division. Last year the result of that study was embodied in the new disability retirement plan which was enacted into law for members of the State Police in management and for those in the officer unit. Captains and Lieutenants. Since the larger negotiating unit represented by PBA did not arrive at a contract during the Legislative session, an exclusion of this benefit for that unit was incorporated into that Legislation. Its contract has since been signed and this bill

merely removes that exclusion and permitting such benefits for the members of the rank below Lieutenant, the larger negotiating unit. This Legislation is necessary in order to correct the existing difficulty of two disability retirement plans with the Division. I, as Superintendent, have the authority to reassign members and by such reassignment can diminish benefits under the existing two plans. The bill will also permit the Division to resolve several disability problems now existing. Under the continuing contractual restrictions, referred to above, I am forced to retain members at full pay status who contribute nothing and who continue to occupy positions with the Division.

Arguments in opposition to bill: None

Reasons for recommendation: See six above.

(William E. Kirwan signature)
Superintendent

Hinman, Straub, Pigors and Manning
Attorneys at Law
121 State Street
Albany, New York 12207
Tel. 518-436-0751

May 25, 1972

Hon. Michael Whiteman
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: Assembly 12392

Dear Mr. Whiteman:

This bill repeals the exclusion of members of the Division of the New York State Police from the applicability of Section 24 of Chapter 684 of the Laws of 1971. Section 24 added a new Section 363-"State police disability retirement allowance", which was applicable to all police personnel except those members of the Division of New York State Police who are in employer-employee negotiating units.

This bill would enable New York State Police to obtain the following benefits: (1) non-service connected disability benefit provided the member has at least five years total service credit; and (2) a pension benefit of one-half of the member's final average salary in addition to any benefits payable pursuant to the Workmen's Compensation Law and the federal Social Security Act provided that the entire compensation received by the member does not exceed his final salary.

This bill will end the existing discrimination against members of the Division of the New York State Police with respect to retirement and pension benefits, which benefits are

presently enjoyed by all other members of the Policemen's and Firemen's Retirement System.

For these reasons, the bill should be enacted into law.

Respectfully submitted

s/Hinman, Straub, Pigors and Manning
Hinman, Straub, Pigors and Manning,
Legislative Counsel for the Police
Benevolent Association of the New
York State Police, Inc.

Plaintiff seeks to add a new claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§623 et seq. *See* Am. Cplt. ¶¶ 1, 90-95. This claim is futile. Plaintiff alleges that, when he was forced by the State Police to retire in 1989 because of disability, the State Police did so because of his age. Any such claim is not only merely conclusory and contradicted by his own pleadings here and in state court,[12] it is also untimely and fails to meet the statutory administrative prerequisites. Plaintiff had to first file a state administrative human rights complaint, and, at any rate had to file a charge with the EEOC within 300 days of the alleged discriminatory act. 29 U.S.C. §§ 626(d)(2), 633(b); *see Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 99 S.Ct. 2066 (1979). There are no allegations that plaintiff did so or that this action is timely. (The only EEOC charge alleged appears to relate to the medical claims. See n. 10 ante. The original defendants have not reported receiving any EEOC charge.)

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[12] If plaintiff had reason to believe that he was not retired because of a disability, but because of his age or any other non-disability factor, he could have challenged his retirement instead of seeking a higher level of disability benefits.

Notice of Appeal

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MICHAEL MISZKO, JR.,

Plaintiff,

NOTICE OF APPEAL
CV 95-01111
(JSR, J.)

-against-

ATTORNEY GENERAL OF NEW YORK, STATE, NEW YORK STATE POLICE, JAMES W. McMAHON, Superintendent of the New York State Police, NEW YORK STATE POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM, H. CARL McCALL, Comptroller, EDWARD V. REGAN, former Comptroller

Defendants.

PLEASE TAKE NOTICE that plaintiff, Michael Miszko, Jr., in the above captioned matter hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Jed S. Rakosf, U.S.D.J. issued on July 3, 1996.

I hereby certify that a copy of this Notice was forwarded via Federal Express to the Attorney General of the State of New York on this date.

(Patrick P. Toscano, Jr. signature)
Patrick P. Toscano, Jr., Esq.

Pope, Grossman, Bergrin &
Toscano, P.A.

Attorneys for Plaintiff
572 Market Street
Newark, New Jersey 07105
(201) 589-7744

Dated: July 31, 1996

APPENDIX F

Appendix F - New York State Senate Bill No. 4439, dated April 14, 1997, L. 1997, c. 598, § 2.

STATE OF NEW YORK
4439
1997-1998 Regular Sessions
IN SENATE
April 14, 1997

Introduced by Sen. SKELOS — read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions

AN ACT to amend the retirement and social security law, in relation to state police disability retirement allowance

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision a of section 363-b of the retirement and social security law, as amended by chapter 1046 of the laws of 1973, is amended to read as follows:

a. Every member or officer of the division of state police in the executive department who becomes physically or mentally incapacitated for the performance of duty prior to July first, nineteen hundred seventy-four, shall be covered by the provisions of this section in lieu of the provisions of section three hundred sixty-two or three hundred sixty-three of this article; except, however, any such member or officer who last entered or reentered [service in the division prior to April first, nineteen hundred seventy-one] THE NEW YORK STATE AND LOCAL POLICE AND FIRE RETIREMENT SYSTEM OR TRANSFERRED TOTAL SERVICE CREDITS AS DEFINED IN SUBDIVISION THIRTY-FOUR OF SECTION THREE HUNDRED TWO OF THIS ARTICLE TO SUCH SYSTEM PRIOR TO SERVICE IN THE DIVISION OF STATE POLICE, or, in the case of a member in a collective negotiating unit consisting of members of the state police below the rank of lieutenant and established pursuant to article fourteen of the

civil service law, last entered or reentered service in the division prior to May thirtieth, nineteen hundred seventy-two, shall be entitled to apply for disability retirement pursuant to such sections and to receive the benefit so payable in lieu of the benefit payable pursuant to this section.

§ 2. This act shall take effect immediately and shall apply retroactively to the date of retirement for all employees who would receive an increase in benefits.

FISCAL NOTE.—This bill would grant an officer who entered or transferred into the New York State and Local Police and Fire Retirement System prior to service in the division of state police, eligibility for the disability benefits provided by Section 362 or Section 363 of the Retirement and Social Security Law.

If this bill is enacted, and the six (6) retired members known to be affected are granted an accidental disability retirement benefit, we estimate that there will be a cost of approximately $1.1 million which would be borne by the State of New York as a one-time payment. In addition, there may be additional costs for members and retirees whom we have not identified.

This estimate, dated February 28, 1997 and intended for use only during the 1997 Legislative Session, is Fiscal Note No. 97-114 prepared by the Actuary for the New York State and Local Police and Fire Retirement System.

BILL NUMBER: S4439

PURPOSE:

To eliminate the current disparity for members of the New York State Policeman's and Fireman's retirement system who sustained injuries in the line of duty as members of the New York State Police and who have been denied Accidental Disability Retirement benefits.

SUMMARY OF PROVISIONS:

Amends subdivision a of section 363-b of the retirement and social security law, as amended by chapter 1046 of the laws of 1973.

EXISTING LAW:

Provides for an inequity for certain members who were injured in the line of duty and who have been denied Accidental Disability Retirement benefits.

JUSTIFICATION:

By Chapter 276 of the Laws of 1979, the functions and powers of the State Office of Parks and Recreation, in relation to providing police protection on certain parkways, were transferred to the division of State Police, effective January 1, 1980. All eligible members of the State Parkway Police Department became State Troopers on that date. All members who transferred were given full credit for purposes of retirement which included the proper pay scale for years of State service. Tier 1 and 2 members were transferred as the same. Prior to becoming troopers, Tier I employees were eligible to receive the benefits of Section 363 of the Retirement and Social Security Law in the event that they became permanently incapacitated as a result of an accident occurring during the performance of their duties. This is effect means that they were eligible to receive 75% of their final average salary, if permanently disabled. Because of a legislative oversight, this situation was not addressed in the transfer legislation and therefore their disability benefits were diminished by giving these Tier 1 members a Tier 2 benefit which was 25% less than they would have been entitled to as Tier 1 members.

The New York State Policemen's and Firemen's Retirement System, in the case of six of these members who have received disability retirements, has concluded that they are eligible for the benefit of section 363-b, under the State Police disability retirement allowance and are not eligible for accidental disabilities as otherwise provided under section 363. This change results in as much as a 25% loss of pension entitlement and this proposal is submitted to correct and clarify the intent of the 1979 law by insuring that no former Tier 1 member of the New York State Parkway Police Department would have their pension entitlement diminished by giving them a Tier 2 benefit due to the fact that their employment was transferred to the Division of State Police.

LEGISLATIVE HISTORY:

New bill.

FISCAL IMPLICATIONS:

If this bill is enacted, and the six retired members known to be affected are granted an accidental disability retirement benefit, the Comptroller's office estimates that there will be a cost of approximately $1.0 million which would be borne by the State of New York as a one-time payment. In addition, there may be additional costs for members and retirees whom the Comptroller's office has not identified.

EFFECTIVE DATE:

This act shall take effect immediately.

New York State Bill S04439

All available information for bill S04439, except its text, is supplied in this document. You may jump to a particular item by selecting from the menu below, or you may simply scroll down through this document. To view the bill text, select the last item from the menu below.

[Summary] [Actions] [Votes] [Memo] [Text]

Summary of Bill S04439

BILL NO S04439
SPONSOR SKELOS
COSPNSR
MLTSPNSR
Amd S363-b, R & SS L

Provides that disabled members of the policeman's and fireman's retirement system who last re-entered or transferred service credit to such system prior to May 30, 1972 shall be entitled to receive certain benefits pursuant to the retirement and social security law.

Actions on Bill S04439

04/14/97	REFERRED TO CIVIL SERVICE AND PENSIONS
06/25/97	COMMITTEE DISCHARGED AND COMMITTED TO RULES
06/25/97	ORDERED TO THIRD READING CAL. 1449
06/25/97	PASSED SENATE
06/25/97	DELIVERED TO ASSEMBLY
06/25/97	referred to ways and means
08/01/97	substituted for a6836
08/01/97	ordered to third reading rules cal.1014
08/01/97	passed assembly
08/01/97	returned to senate
09/05/97	submitted to Gov. for signature

Votes on Bill S04439

BILL: S04439 DATE: 08/01/1997

MOTION: YEA/NAY: 144/000

Abbate	Y	Feldman	Y	Millman	Y
Acampor	Y	Ferrara	Y	Morelle	Y
Alfano	Y	Fessend	Y	Nesbitt	Y
Anderso	Y	Flanaga	Y	Polonet	Y
Arroyo	Y	Galef	Y	Prentis	Y
Aubry	Y	Gantt	Y	Pretlow	Y
Bacalle	Y	Genoves	Y	Ramirez	Y
Balboni	Y	Hill	Y	Ravitz	Y
Barraga	Y	Hochber	ER	Reynold	Y
Bea	Y	Hoyt	Y	Rivera	Y
Carrozz	Y	Jacobs	Y	Robach	Y
Casale	Y	John	Y	Sanders	Y
Christe	Y	Johnson	Y	Scarbor	Y
Clark	Y	Katz	Y	Tedisco	Y
Colman	Y	Kaufman	Y	Thiele	Y
Colton	Y	Keane	Y	Tocci	Y
Connell	Y	Kirwan	Y	Tokasz	Y
Conte	Y	Mayerso	Y	Tonko	Y
Cook	Y	Mazzare	Y	Towns	Y
Crouch	Y	McEneny	Y	Townsen	Y
Eve	Y	McGee	Y	Vann	Y
Farrell	Y	McLaugh	Y	Vitalia	Y
Faso	Y	Meeks	ER	Warner	Y
		Miller	Y		

APPENDIX G

Appendix G - Cover letter from John McManaman, Assistant Deputy Comptroller, New York State and Local Retirement Systems, dated August 24, 1994, with attached Application for Policemen's and Firemen's Retirement for Disability Incurred in Performance of Duty, dated May 29, 1991, and Findings of Fact and Conclusions of Law, Dated July 21, 1994

New York State and Local Retirement Systems
Employees' Retirement System
Police and Fire Retirement System

H. Carl McCall, State Comptroller

Gov. Smith State Office Building, Albany, New York 12244
(518-474-4600)

John McManaman
Assistant Deputy Comptroller

August 24, 1994

Mr. Michael Miszko
209 VanTyne Road
Accord, NY 12404

Reg. #0A41396-3

Dear Mr. Miszko:

We are enclosing herewith a copy of the Decision of the Hearing Officer, as well as a copy of the Findings of Fact and Conclusions of Law, in the matter of application for a performance of duty disability retirement benefits.

If you are dissatisfied with the result in this matter, you have the right to judicial review in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules. You have four months from the date of this letter to commence such a proceeding.

The Comptroller and the Retirement System have no further jurisdiction in this matter and cannot assist you in obtaining judicial review. Since there is a very short statute of limitations involved, you may wish to consult an attorney for advice on seeking judicial review.

Very truly yours,

S/John McManaman
John McManaman

JMcM:men
Encs.

Received: 8/26/94

G-3

Application for Policemen's And Firemen's Retirement for Disability Incurred in Performance of Duty
PF 6047
(8/84)

Registration Number: OA41396-3

Name Last: Miszko
First: Michael, Jr.
Sex: Male

Social Security Number*: 088365274

Address: RR #1, Box 77-B
Accord, New York 12404

Telephone Home: (914) 626-7980
Business: N/A

Date of Birth: 10/21/45

Retirement Number: OAA545410

Employer: New York State Police

Payroll Title: Trooper

Length of Service: 16 years, 5 months

Payroll Status:
On Payroll and Receiving Salary?: No
If No, Explain: As of 02/15/90 State Police Disability Retirement.

List Dates of Occurrence(s) & Workers' Compensation Number Assigned:

1. 04/05/75 WCB57504959
2. 10/13/84 WCB58418362
3. 11/27/86 WCB58623016
4. 09/08/88 WCB58823020
5. 03/13/89 WCB58907826

I AM PERMANENTLY DISABLED BECAUSE OF: Internal derangement of right knee, HNP and acquired spinal stenosis of lower back. Stress and anxiety related reactions stemming from the workplace.

I HAVE BEEN TREATED BY THE FOLLOWING DOCTORS:
Injury of: 04/05/75
Doctor's Name: Dr. Herbert Martin, M.D.
Address: 210 Wall Street
Kingston, New York 12401

Injury of: 10/13/84
Doctor's Name: Dr. Robert C. Hendler, M.D.
Address: Cypress Road
Goshen, New York 10924

Injury of: 09/08/88
Doctor's Name: Dr. Zandra Rios Rivera, M.D.
Address: 140 Pine Street
Kingston, New York 12401

Injury of: 11/27/86 and 03/13/89
Doctor's Name: Dr. John Handago, M.D.
Address: 17 M & South St., Bldg. 800
Goshen, New York 10924

LIST HOSPITALIZATIONS:
Hospital Name: Goshen Professional Bldg.
Address: Cypress Road

Goshen, New York 10924
Date of Admission: 09/04/85

Hospital Name: Horton Memorial Hospital
Address: 60 Prospect Avenue
Middletown, New York 10940
Date of Admission: 11/27/86

Hospital Name: Benedictine Hospital
Address: 105 Mary's Avenue
Kingston, New York 12401
Date of Admission: 03/13/89

THE FOLLOWING PERSON(S) WITNESSED THE OCCURRENCE(S):
Injury of: 04/05/75
Witnesses Name: Mr. Kenneth Osterhoudt
Address: Maple Avenue
Kerhonkson, New York 12446

Injury of: 10/13/84
Witnesses Name: Constable D. Eighmey
Address: Tn/Hurley Constabulary
Hurley, New York 12443

Injury of: 03/13/89
Witnesses Name: Sgt. D. Koeppen/PO S.J. Karaffa
Address: Tn/Ulster Police Department
Kingston, New York 12401

Date of Occurrence(s):
1. 04/05/75
2. 10/13/84
3. 11/27/86
4. 09/08/88
5. 03/13/89

Occurred at (Location):
1. Maple Ave., Kerhonkson, N.Y.
2. St. Rte. 28, Tn/Hurley, N.Y.
3. Troop Hqs., Middletown, N.Y.
4. Troop Hqs., Middletown, N.Y.
5. Rte. 9W, Tn/Ulster, N.Y.

The description of the occurrence(s) is as follows:

1. Injury Date: 04/05/75
Description: While investigating a Burglary complaint and searching basement rafter area for missing articles, member was injured when foreign material fell into member's face and right eye. Foreign material imbedded in right eye was later surgically removed.

2. Injury Date: 10/13/84
Description: While investigating a two car automobile accident, member was entering his troop car when he struck his right knee on the steering wheel and sustained a torn meniscus and damaged kneecap.

3. Injury Date: 11/27/86
Description: While changing into my work uniform at SP Middletown, N.Y., this member bent over to buckle his shoe and upon rising felt pain in the lower back area which was later diagnosed as lumbosacral strain.

4. Injury Date: 09/08/88
Description: While working at SP Middletown, N.Y., this member had suffered debilitating stress and anxiety reactions because of several supervisory and workplace factors. Factors included constant change of shifts on a weekly basis, vascillating supervisory interactions with employees occurring on a daily basis as well as intentional creation of conflicts by calling members at their residences, after a mutually agreed to arrange-

ment, to discourage one employee to not agree to pre-arranged plans.

5. Injury Date: 03/13/89
Description: While working at SP Kingston, N.Y. this member was injured while arresting a drunk driver. As a result of the injuries sustained member was retired from the New York State Police on 02/15/90.

DUAL MEMBERSHIP:
If you are a member of both retirement systems (the New York State Employees' Retirement System and the New York State Policemen's and Firemen's Retirement System, please check box. (During the period of September 1969 to June 1970.)
*NOTE: In accordance with the Federal Privacy Act of 1974 you are hereby advised that disclosure of your Social Security account number is mandatory pursuant to Section 11, 34, 311 and 334 of the Retirement and Social Security Law. Your number will be used in identifying your retirement records and in the administration of the Retirement System.

INFORMATION ABOUT YOUR INTENDED BENEFICIARY: For Estimate Purposes Only
Beneficiary's Name: Susan E. Miszko
Address: RR #1, Box 77-B
Accord, New York 12404
Relationship: Spouse
Sex: Female
Beneficiary's Social Security No.*: 105388001
Date of Birth: 03/09/47

Authorization for release of medical information will be given only when the specific information requested is made in writing and subsequently approved by the applicant listed on the reverse side and his legal representative. S/Michael Miszko, Jr.

State of New York
County of Ulster ss.:

On the 29th day of May, 1991, before me personally appeared Michael Miszko, Jr. to me known and known to me to be the same person described in and who executed the foregoing instrument, and he duly acknowledged to me that - he executed the same. S/Gail Countryman

Notary Public, State of New York
County of Ulster
Commission Expires September 30, 1991

NEW YORK STATE AND LOÇAL POLICE AND FIRE RETIREMENT SYSTEM

In the Matter of the Application
of
MICHAEL MISZKO
Reg. No. 0A41396-3
H.C. No. 93-54

Pursuant to Section 374 of the Retirement and Social Security Law for a hearing and redetermination.

A hearing having been held in the above-entitled matter on September 17, 1993 at the Alfred E. Smith State Office Building, Albany, New York, with the HONORABLE MORTON M.Z. LYNN presiding as Hearing Officer, and the applicant, MICHAEL MISZKO, have appeared pro se, and the New York State and Local Police and Fire Retirement System, having appeared by JOHN F. BLACK, ESQ., its Counsel, by ROBERT E. COUGHLIN, ESQ., of Counsel, and all of the proofs having been read, and all of the evidence taken and introduced having been read and considered,

NOW, after due deliberation, the State Comptroller finds and decides as follows:

FINDINGS OF FACT

1. On May 29, 1991, the applicant, Michael Miszko, filed an application for Policemen's and Firemen's Retirement for Disability Incurred in the Performance of Duty.

2. Said application was administratively disapproved on the basis that the applicant joined the Division of State Police after May 31, 1972 and, therefore, was not eligible for the benefit.

3. Thereafter, the applicant filed a timely request for a hearing and redetermination.

4. The applicant entered the Division of State Police on September 6, 1973.

5. On January 18, 1990 he filed an application for accidental disability retirement benefits.

6. That application was disapproved on the basis that the applicant was only eligible for the special disability retirement benefit made available by Section 363-b of the Retirement and Social Security Law to members of the State Police and not to the accidental disability retirement benefit.

7. Upon hearing and redetermination the application for accidental disability retirement was denied and that denial was upheld in an Article 78 proceeding in Supreme Court, Justice Vincent G. Bradley presiding, as well as in subsequent appeals.

CONCLUSIONS OF LAW

1. The Policemen and Firemen's retirement for disability incurred in the performance of duty is not available to a member who is subject to Section 363-b of the Retirement and Social Security Law (Retirement and Social Security Law §363-c(h)).

2. The applicant's status with respect to section 363-b was previously determined in another administrative hearing and in the subsequent appeals. The applicant is entitled to the disability retirement benefit afforded by the section to persons who entered the Division of State Police on or after May 31, 1972 (*Matter of Charles A. Field Delivery Service*, 66 NY2d 516).

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY DETERMINED AND DIRECTED that the application of Michael Miszko for Performance of Duty Disability Retirement be and the same is hereby DENIED.

Dated at Albany, New York, this 21st day of July, 1994.

H. CARL MCCALL
State Comptroller

BY s/Morton M.Z. Lynn

MORTON M.Z. LYNN
Hearing Officer

APPENDIX H

Appendix H - New York State Constitution, Article V, §7

[Membership in retirement systems; benefits not to be diminished nor impaired.] § 7. After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

APPENDIX I

Appendix I - United States Constitution,
Article I, §10, ¶1

The CONSTITUTION of the United States

with Index and

The Declaration of Independence

Published by
the Commission on the Bicentennial of
the United States Constitution
Washington, D.C.

First Edition, 1986
Second Edition, 1987
Third Edition (with index), 1987
Fourth Edition, 1988
Fifth Edition, 1988
Sixth Edition, 1988
Seventh (Special Limited Inaugural) Edition, 1989
Eighth (Special Military) Edition, 1989
Ninth (Limited Eastern European) Edition, 1990
Tenth (Special Boy Scout) Edition, 1990
Eleventh (Special Girl Scout) Edition, 1990
Twelfth Edition (with Declaration of Independence), 1990
Thirteenth Edition, 1991

CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.]* The actual Enumeration

*Changed by section 2 of the Fourteenth Amendment.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.*

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State

*See Sixteenth Amendment.

on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President,

APPENDIX J

Appendix J - Section 363, New York State Retirement and Social Security Law (RSSL).

§ 363. Accidental disability retirement

a. A member shall be entitled to an accidental disability retirement allowance if, at the time application therefor is filed, he is:

1. Under age sixty, and
2. Physically or mentally incapacitated for performance of duty as the natural and proximate result of an accident not caused by his own willful negligence sustained in such service and while actually a member of the policemen's and firemen's retirement system, and
3. Actually in service upon which his membership is based. However, in a case where a member is discontinued from service subsequent to the accident, either voluntarily or involuntarily, application may be made not later than two years after the member is first discontinued from service and provided that the member meets the requirements of paragraphs one and two of subdivision a of this section.

b. Application for an accidental disability retirement allowance for such a member may be made by:

1. Such member, or
2. The head of the department in which such member is employed, or
3. Some person acting on behalf of and authorized by such member.

c. (a) After the filing of such an application such member shall be given one or more medical examinations. No such application shall be approved, however, unless the member or some other person on his behalf shall have filed written notice in the office of the comptroller within ninety days after the accident, setting forth:

1. The time when and the place where such accident occurred, and

2. The particulars thereof, and
3. The nature and extent of the member's injuries, and
4. His alleged incapacity.

(b) The notice herein required need not be given:

1. If notice of such accident shall be filed in accordance with the provisions of the workers' compensation law of any state within which a participating employer shall have its employees located or performing functions and duties within the normal scope of their employment, or
2. If the application for accidental disability retirement is filed within one year after the date of such accident, or
3. If a failure to file notice has been excused for good cause shown as provided by rules and regulations promulgated by the comptroller.

d. If the comptroller determines that the member is physically or mentally incapacitated for the performance of duty and ought to be retired for accidental disability, such member shall be so retired. Such retirement shall be effective as of a date approved by the comptroller.

e. The retirement allowance payable upon accidental disability retirement shall consist of:

1. An annuity which shall be the actuarial equivalent of the member's accumulated contributions, plus
2. A pension which is the actuarial equivalent of the reserve-for-increased-take-home-pay to which he may be entitled, if any, plus
3. A pension of three-quarters of his final average salary. The payment of such pension shall be subject to the provisions of section three hundred sixty-four of this article.

f. If the member, at the time of the filing of an application under the provisions of subdivision b hereof, is eligible for a service retirement benefit, then and in that event, he may simultaneously file an application for service retirement in accordance with the provisions of section seventy of this chapter, provided that the member indicates on the application

for service retirement that such application is filed without prejudice to the application for accidental disability retirement. (Added L.1966, c. 1000, § 2; amended L.1975, c. 619, § 2; L.1975, c. 622, § 1; L.1980, c. 462, § 2.)

Historical Note

1980 Amendment. Subd. c, par. (a). L.1980, c. 462, § 2, eff. Sept. 1, 1980, incorporated separate amendments made by L.1975, cc. 619, 622; designated existing text as par. (a); and omitted provisions relating to the discretion of the comptroller to excuse a failure to file notice and waiving notice where a notice has been filed pursuant to the Worker's Compensation Law, or where the application is filed within one year of the accident.

Subd. c, par. (b). L.1980, c. 462, § 2, added par. (b).

Effective Date of Amendment by L.1980, c. 462; Applicability. See section 3 of L.1980, c. 462, set out as a note under section 63.

Effective Date. Section effective Apr. 1, 1967, pursuant to L.1966, c. 1000, § 5.

Cross References

Payment of salary, wages, medical and hospital expenses of policemen with injuries or illness incurred in the performance of duties, see General Municipal Law § 207-c.

Procedure for retirement, see section 374.

Retirement for disability incurred in performance of duty after Jan. 1, 1985, see section 363-c.

New York Codes, Rules and Regulations

Application for retirement benefits while on an authorized leave of absence without pay for medical reasons, see 2 NYCRR Part 309.

Good cause for failure to file timely notice of accident as required by this section, see 2 NYCRR Part 331.

West's McKinney's Forms

The following forms appear in Selected Consolidated Law Forms under section 363 of the Retirement and Social Security Law:

Notice of petition on article 78 proceeding to review state comptroller's determination disapproving patrolman's application for accidental retirement allowance, see Form 1.

Petition on article 78 proceeding to review state comptroller's determination disapproving patrolman's application for accidental retirement allowance, see Form 2.

Library References

American Digest System

Employee pension and benefits-

County, see Counties, West, Key, 69(3).

Municipal, see Municipal Corporations, West, Key, 187(5), 200(5), 220(9).

State, see States, West, Key, 64.1(5).

Encyclopedia

Employee pension and benefits-

County, see C.J.S. Counties § 130.

Municipal, see C.J.S. Municipal Corporations §§ 588, 589, 614, 615, 727.

State, see C.J.S. States § 116.

APPENDIX K

Appendix K - Section 363-b, New York State Retirement and Social Security Law.

§ 363-b. State police disability retirement allowance

a. Every member or officer of the division of state police in the executive department who becomes physically or mentally incapacitated for the performance of duty prior to July first, nineteen hundred seventy-four, shall be covered by the provisions of this section in lieu of the provisions of section three hundred sixty-two or three hundred sixty-three of this article; except, however, any such member or officer who last entered or reentered service in the division prior to April first, nineteen hundred seventy-one, or, in the case of a member in a collective negotiating unit consisting of members of the state police below the rank of lieutenant and established pursuant to article fourteen of the civil service law, last entered or reentered service in the division prior to May thirtieth, nineteen hundred seventy-two, shall be entitled to apply for disability retirement pursuant to such sections and to receive the benefit so payable in lieu of the benefit payable pursuant to this section.

b. Eligibility. A member or officer shall be entitled to a state police disability retirement allowance if, at the time application therefor is filed, he is:

1. Under age sixty, and
2. (a) Physically or mentally incapacitated for performance of duty as the natural and proximate result of a disability not caused by his own willful negligence sustained in such service and while actually a member of the policemen's and firemen's retirement system, or
   (b) Physically or mentally incapacitated for performance of duty as a result of a disability that was not sustained in such service, and has at least five years of total service credit in the division, and
3. Actually in service upon which his membership is based, or, have been discontinued from service, either voluntarily or involuntarily for not more than ninety days provided the member was disabled prior to such discon-

tinuance. However, in a case where a member is discontinued from service, either voluntarily or involuntarily, subsequent to sustaining a disability in such service, application may be made not later than two years after the member is discontinued from service and provided that the member meets the requirements of subdivisions a and b of this section.

c. Application. Application for a state police disability retirement allowance may be made by:

1. Such member, or
2. The superintendent of state police or his designee, or
3. A person acting on behalf of and authorized by such member.

d. Verification of disability. After the filing of such an application, such member shall be given one or more medical examinations. If the comptroller determines that the member is physically or mentally incapacitated for the performance of duty pursuant to subdivision b of this section and ought to be retired, he shall be so retired. Such retirement shall be effective as of a date approved by the comptroller.

e. Upon retirement pursuant to this section one of the following retirement allowances shall be payable:

1. If a member has completed twenty or more years of creditable service and is eligible for service retirement his retirement allowance shall be equal to that which he would have received in the case of service retirement.
2. If a member is not eligible for a service retirement as specified in paragraph one of this subdivision, his retirement allowance shall consist of:
   (a) An annuity which shall be the actuarial equivalent of the member's accumulated contributions attributable to service rendered prior to April first, nineteen hundred sixty as provided pursuant to paragraph four of subdivision b of section three hundred eighty-one-b of this article plus

(b) A pension which together with such annuity provides an allowance equal to one-half of his final average salary.

f. If the member, at the time of the filing of an application under the provisions of subdivision c hereof, is eligible for a service retirement benefit, then and in that event, he may simultaneously file an application for service retirement in accordance with the provisions of section three hundred eighty-one-b of this article, provided that the member indicates on the application for service retirement that such application is filed without prejudice to the application for the state police disability retirement allowance.

g. Any benefit provided pursuant to this section shall not be considered as an accidental disability benefit within the meaning of section three hundred sixty-four of this article. Any benefits payable pursuant to the workmen's compensation law to a member or officer receiving a disability allowance pursuant to this section shall be in addition to such state police disability allowance, provided, however, that in the event the disabled retired member is also entitled to disability benefits under the federal social security act, and the sum of the disability retirement allowance, supplemental retirement allowance, workmen's compensation benefit, and the primary social security disability insurance benefit exceeds final salary as defined in subdivision e, section four hundred two of this article, that portion of the pension which increases the combined benefit above final salary shall be suspended for the duration of the period that the combined benefit would so exceed final salary.

(Added L.1971, c. 684, § 24; amended L.1972, c. 635, § 7; L.1973, c. 38, § 7; L.1973, c. 1046, § 32; L.1983, c. 507, § 1.)

APPENDIX L

Appendix L - Section 363-c, New York State Retirement and Social Security Law.

§ 363-c. Retirement for disability incurred in performance of duty

a. After January first, nineteen hundred eighty-five, a member who becomes physically or mentally incapacitated for the performance of duty shall be covered by the provisions of this section in lieu of the provisions of section three hundred sixty-three of this article; except, however, any such member who last entered or re-entered service prior to that date shall be entitled to apply for disability retirement pursuant to such section and to receive the benefit so payable in lieu of the benefit payable pursuant to this section.

b. Eligibility. A member shall be entitled to retirement for disability incurred in the performance of duty if, at the time application therefor is filed, he is:

1. Under age sixty, and
2. Physically or mentally incapacitated for performance of duty as the natural and proximate result of a disability not caused by his own willful negligence sustained in such service and while actually a member of the policemen's and firemen's retirement system, and
3. Actually in service upon which his membership is based. However, in a case where a member is discontinued from service, either voluntarily or involuntarily, subsequent to sustaining a disability in such service, application may be made not later than two years after the member is discontinued from service and provided that the member meets the requirements of subdivisions a and b of this section.

c. Application. Application for retirement for disability incurred in performance of duty may be made by:

1. Such member, or
2. The head of the department in which such member is employed.

d. Verification of disability. After the filing of such an application, such member shall be given one or more medical examinations. If the comptroller determines that the member is physically or mentally incapacitated for the performance of duty pursuant to subdivision b of this section and ought to be retired, he shall be so retired. Such retirement shall be effective as of a date approved by the comptroller.

e. (a) No such application shall be approved, however, unless the member or some other person on his behalf shall have filed written notice in the office of the comptroller within ninety days after the occurrence which is the basis for the disability incurred in the performance of duty, setting forth:

1. The time, date and place of such occurrence, and
2. The particulars thereof, and
3. The nature and extent of the member's injuries, and
4. The alleged disability.

(b) The notice herein required need not be given:

1. If notice of such occurrence shall be filed in accordance with the provisions of the workers' compensation law of any state within which a participating employer shall have its employees located or performing functions and duties within the normal scope of their employment, or
2. If the application for retirement for disability incurred in the performance of duty is filed within one year after the date of the occurrence which forms the basis for the application, or
3. If a failure to file notice has been excused for good cause shown as provided by rules and regulations promulgated by the comptroller.

(c) Notwithstanding any other provision of law to the contrary, the provisions of this subdivision shall apply to all occurrences before or after the effective date of this section.

f. The retirement allowance payable upon retirement for disability incurred in the performance of duty shall consist of a pension of one-half of his final average salary plus an annuity

which shall be the actuarial equivalent of the member's accumulated contributions, if any.

g. If the member, at the time of the filing of an application under the provisions of subdivision c of this section, is eligible for a service retirement benefit, then and in that event, he may simultaneously file an application for service retirement provided that the member indicates on the application for service retirement that such application is filed without prejudice to the application for the retirement for disability incurred in performance of duty.

h. The provisions of this section and the benefits provided for therein shall not be applicable to members who are subject to the provisions of section three hundred sixty-three-b of this article.

i. Any benefit provided pursuant to this section shall not be considered as an accidental disability benefit within the meaning of section three hundred sixty-four of this article. Any benefit payable pursuant to the workers' compensation law to a member receiving a disability allowance pursuant to this section shall be in addition to such retirement for disability incurred in performance of duty allowance.

j. A final determination of the comptroller that the member is not entitled to retirement benefits pursuant to this section shall not in any respect be, or constitute, a determination with regard to benefits payable pursuant to section two hundred seven-a or section two hundred seven-c of the general municipal law. (Added L.1984, c. 661, § 1.)

Historical Note

Effective Date. Section effective Aug. 1, 1984, pursuant to L.1984, c. 661, § 6.

Cross References

Payment of salary, wages, medical and hospital expenses of policemen with injuries or illness incurred in the performance of duties, see General Municipal Law § 207-c.

Library References

American Digest System

State disability benefits, see States, West, Key, 64.1(5).

Encyclopedia

State employee disability benefits, see C.J.S. States § 116.

APPENDIX M

Appendix M - New York State - PBA, Grievance, dated January 27, 1989

STATE - PBA
GRIEVANCE APPEAL*

(The Grievant is referred to Article 15 of the Current Agreement between the State of New York and the PBA of New York State Troopers, Inc. which describes the grievance procedure in detail.)

To be completed by Grievant:

Name: Michael Miszko, Jr.

Rank: Trooper

Troop/Unit: Troop "F"

Work Location: Communications

Immediate Supervisor: T/Sgt. C.L. Heady

Non-Contract Grievance

STEP 2

This appeal to Step 2 is to be presented within five working days of the receipt of the Step 1 decision.

Date of Occurrence: January 27, 1989

Statement of facts: See Attached Grievance.

Remedy sought: See Attached Grievance.

M-2

Date Submitted: February 10, 1989

Grievant: TPR. Michael Miszko, Jr.

STEP 1

Date grievance received: 2/10

Decision: Denied - See Attached

Date decision issued: 2/28

s/George Myers, Capt.

**Step 1 of the grievance procedure provides that the grievance is to be presented orally to Grievant's immediate supervisor within twenty working days of the event giving rise to the grievance.*

Troop: F Station: Middletown
Date: February 10, 1989

NON-CONTRACT GRIEVANCE - INVOLUNTARY INTRA-TROOP TRANSFERS OF GRIEVANT.

Grievant: Trooper Michael Miszko, Jr.

This grievance is respectfully being submitted by Grievant in order to resolve an issue of great concern regarding the above captioned subject.

At the outset I would like to state emphatically that this grievance is not intended as an act of hostility towards the Division of State Police or any of the majority of fine members that comprise its structure. I have sought the advice of others on this matter who concur and have encouraged me to proceed in this fashion. I have also attempted to bring about the informal resolution of differences with all concerned but the unfortunate resultant factor has been the filing of this Grievance based on the below described experiences of the Grievant.

Briefly, the facts surrounding this Grievance involve the selection process used to transfer Grievant from the Troop "F" Headquarters Communications Section to SP Kingston, N.Y. effective February 18, 1989. This is the second of such transfers for Grievant and he feels he has been discriminated against. Grievant is presently assigned to the Troop Communications Section pursuant to a one year implied extension which commenced July 1988 and which was made the subject of a memorandum dated June 6, 1988; a copy of which is attached as "Reference A". By implied it is meant that the Grievant submitted his referenced memorandum through proper channels but never received a proper reply. He has, however, been allowed to continue in his present assignment since July 1988.

Grievant feels that this latest intra-troop transfer was not rendered in a fair and equitable manner nor in the best interests of the Division; but rather, in an arbitrary and capricious manner. The following facts will serve to substantiate Grievant's contention.

Grievant was informed by Uniform Captain, Raymond S. Ketcham, on January 27, 1989 that the reason for Grievant's transfer was due to fiscal constraints which caused the elimination of another member's position as assistant to the First Sergeant; and, because he is senior to the Grievant and because Grievant had over two years in his present assignment, he was replacing the Grievant in the Communications Section. Yet, there is in the Communications Section another member who has been there for approximately eight years.

Grievant is the most senior trooper in the Communications Section and feels that inverse seniority transfers based on favoritism and subterfuged by policy are inherently discriminatory and have historically been held to be done in bad faith.

The issue of seniorty for involuntary intra-troop transfers is not specifically addressed in either the current Agreement between the State of New York and the P.B.A. of the New York State Troopers, Inc. or the NYSP Administrative Manual, Article 2, Section 2b, entitled Intra-Troop Transfer. However, in discussion of seniority as it pertains to areas of inter-troop transfers or vacation picks, it is sufficiently explained. Therefore, since seniority appears not to come into play for involuntary intra-troop transfers, as opposed to certain voluntary transfers, it renders the matter subject to possible discriminatory abuses. If seniority is used as a criteria for one member, then the same privilege of seniority should be available to the Grievant. To do otherwise is discriminatory and creates an adverse impact on career opportunities. To favor junior members over senior members in this case is inappropriate and denies an innocent

employee the benefits of his years of service. Seniority has historically been held to be an equitable remedy when it came to the selection of personnel for either job assignments or layoffs (Memphis Firefighters, Local 1784 vs. Stotts, 1984, U.S. Supreme Court). To have it any other way tends to generate practices which appear fair in form but which are discriminatory in operation. Let me demonstrate with some additional examples.

First, the Grievant was unaware of any available vacancies in the Communications Section, especially during this period of fiscal constraint. If there was a vacancy, why did the Grievant get transferred?

Further, on January 27, 1989 writer submitted memorandum entitled, "Special Assignment Request For Reconsideration" and on February 3, 1989 it was returned disapproved (Reference "B"). The reason cited was, "The transfer is within the guidelines of Article 18 of the New York State Troopers and PBA contractual Agreement." Grievant fails to see where his involuntary intra-troop transfer was covered under Article 18 of the current agreement.

On February 2, 1989 writer submitted a request for transfer memorandum (Reference "C") which was returned on February 3, 1989 with a note attached from T/Sgt Charles L. Heady stating, "Submit this request thru Kingston."

On February 4, 1989 writer submitted another memorandum requesting a position as Assistant to the Communications Supervisor. It was returned on February 6, 1989 indicating that there was no vacancy for the position (see Reference "D"). Something appears wrong here. Grievant was "bumped" out of Communications by an inexperienced member who was senior to Grievant when no known vacancy existed. Grievant is now attempting to utilize his seniority to keep from being transferred

and is being denied the same benefit. If anybody should have been "bumped" it should have been the least senior member. This is favoritism in its purest form and is against all fair labor standards and practices.

Another not so recent but similar example occurred in 1984 when Grievant was involuntarily transferred from SP Ellenville, N.Y. to SP Kingston, N.Y. and which effectively served to curtail his BCI aspirations with the Division of State Police. At this time Grievant will not expound further on this matter but only wants to make reference to show how this type of transfer selection can possibly be employed to block career paths. Intentionally or unintentionally, there is no excuse for what has happened to the Grievant over the past few years.

Further, this member has performed in an excellent manner over the past several years while pursuing his Professional Development endeavors and is desirous of working with his superiors towards the betterment of the Division of State Police. Excellent work and educational performance should be rewarded and encouraged in some positive fashion and not reciprocated with involuntary transfers and blocked career paths. To do otherwise is wrong.

Lastly, these sort of actions tend to add to the stress that is inherent in the Police profession and has caused needless anxiety and frustrations for the Grievant and his family.

In summary, Grievant has strived to achieve certain career and educational goals with the Division of State Police but has been thwarted in his efforts by being transferred unexpectedly and involuntarily rather than on an equitable selection process such as seniority.

Once again, and in closing, Grievant does not want to convey any disrespect for the Division of State Police or any of the

majority of its fine members. He feels it is his duty to inform his employer of any matters which negatively affect him. Grievant is now respectfully submitting this grievance for the remedies sought below:

1. Implementation of involuntary intra-troop transfer policy based on seniority.

2. A quality of work life free from interference, coercion, restraint, or reprisal.

3. The cessation of all harassing, arbitrary and discriminatory treatment of Grievant.

4. Appointment to the BCI or position as Assistant to the Communications Supervisor.

APPENDIX N

Appendix N - Equal Employment Opportunity Commission, Charge of Discrimination, with attached Affidavit, dated January 3, 1994, and Notice of Right To Sue, dated October 26, 1994.

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY: EEOC

CHARGE NUMBER: 160940732

Name: Mr. Michael Miszko
209 VAN TYNE ROAD
ACCORD, NY 12404

Home Telephone: (914) 626-7980

Date of Birth: 10/21/45

Named is the Employer, Labor Organization, Employment Agency Apprenticeship Committee, State or Local Government Agency who discriminated against me.

Name: NYS POLICEMEN'S & FIREMEN'S RET. SY.

Number of Employees, Members: Cat D (501 +)

Telephone: (518) 474-7736

Address: GOVERNOR ALFRED E. SMITH BLDG.,
ALBANY, NY 12225

County: 001

Cause of Discrimination Based On: Disability

Date Discrimination Took Place: Earliest: 09/02/92
Latest: 09/02/92 Continuing Action.

The Particulars are: While out on disability leave relating to an on-the-job injury, I became aware that my Superintendent had, on my behalf, filed an application for retirement under Section 363-B, State Police Disability. As a result of the incorrect retirement application applied for, and while I later submitted the correct applications, I continue to this day, to receive a reduced disability benefit, contrary to the Americans with Disability Act of 1990.

I believe that I have been discriminated against because of my reduced disability benefit pertaining to my disability, in violation of Title I of the Americans with Disabilities Act of 1990.

I declare under penalty of perjury that the foregoing is true and correct.
Date: 1/3/94 Charging Party: s/M. Miszko

NOTARY: s/William J. Lai
I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
s/M. Miszko
SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
3rd Jan., 1994
WILLIAM J. LAI
NOTARY PUBLIC, State of New York
No. 01LA4967082
Qualified in Kings County
Commission Expires May 24, 1994

State of: NEW YORK
City/County of: ACCORD/ULSTER
Case Name: Miszko vs NYS POLICE
Case Number: 160940732

AFFIDAVIT

I, Michael Miszko being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 48 years of age, my gender is Male and my racial identity is White. I reside at 209 VAN TYNE ROAD, City of ACCORD, County of ULSTER, State of NY, Zip Code 12404. My telephone number is (914) 626-7980.

My statement concerns NYS POLICEMEN'S & FIREMEN'S RET.SY. which is located at GOVERNOR ALFRED E. SMITH BLDG., in ALBANY, NY 12225.

I initially joined the NYS Police as a State Trooper in September 6, 1973. I am a Tier I employee who is entitled to Accidental Disability Benefits. Prior to my having been employed as a State Trooper, I worked for the City of Kingston New York Police Department and NYS Department of Corrections. Consequently, at the time of my hiring in September 1973, I was told

by the Comptroller and representatives of the NYS Retirement System that I would be given full credit for my prior police service.

In 1984, I received an on-the-job injury and went out on disability. I returned to a full-time position in the Communications section of Troop Headquarters. In order to return to work, I was required to bring in medical documentation indicating that I could return to full & strenuous duty. I was given an accommodation by my being assigned to the above position up until 1986, when I was involuntarily transferred back to road patrol. In 1989, I again was injured on the job. I ultimately sustained an injury when I was struck by a vehicle operated by a drunk driver and in subsequent attempts to subdue this individual. I reinjured my knee when I tore the medial meniscus cartilage in the right knee and injured my lower back. I was out on disability for approximately one year. In January 1990, I became aware that Superintendent Thomas Constantine had filed on my behalf, an application for retirement under Section 363-B, State Police Disability, of the Retirement and Social Security Law, despite my requests to return to work. I was aware that I was required to bring in a medical note indicating I could return to full & strenuous duty. My doctor did not want to provide such a note because of my disability and the fact that I had been involuntarily transferred out of the Communications position contrary to a prior agreement to remain in that position. I had also filed a grievance concerning this transfer, however, that matter was never resolved.

I started to receive disability benefits under the State Police Disability in May 1990, but received only 50% of my final average salary due to the fact that the Superintendent filed the wrong application. Supt. Constantine was aware of the fact that I did have additional prior police service, although he may have believed that it was not creditable time. However, in an instance where there is any questions, all retirement applications should

be completed and submitted to the Retirement Board for their ultimate decision.

On January 18, 1990 I filed an application for accidental disability but was denied this on January 24, 1990. In May 1991, I filed an application for performance of duty disability pursuant to Section 363-C of the NYS Retirment Social Security Law, which was denied in September 1992. While I understand that I have 300 days to file a charge from the date of notification that I was denied my application, I view this as a continuing matter, as I am still receiving the wrong disability benefit, and I have appealed the letter of September 11, 1992 as a mistake on the part of the retirement system in denying my application for accidental disability retirement under Section 363-C which triggers the accidental disability benefit of 75% of final average salary and with a different date of employment.

I am aware that former Parkway Patrol members who merged with the NYS Police on January 1, 1980, with prior membership in the retirement systems, have also been denied accidental disability benefits pursuant to Section 363-B. These are individuals who have also suffered injuries in the line of duty. If necessary, I could provide their names after first contacting them and obtaining their consent.

I believe that I am being denied full entitlements to accidental disability benefits contractually due me as a NYS disability retiree, in violation of the ADA.

I have read and had an opportunity to correct this Affidavit consisting of 3 typed pages and swear that these facts are true and correct to the best of my knowledge and belief.

s/M. Miszko

Subscribed and sworn to before me
this 3rd day of Jan., 1994.

S/WILLIAM J. LAI
WILLIAM J. LAI
NOTARY PUBLIC, State of New York
No. 01LA4967082
Qualified in Kings County
Commission Expires May 21, 1994

N-7

Equal Employment Opportunity Commission

NOTICE OF RIGHT TO SUE
(Dismissal)

To: Michael Miszko
209 VAN TYNE ROAD
ACCORD, NY 12404

From: EQUAL EMPLOYMENT OPPORTUNITY COMM.
New York District Office
7 World Trade Center, 18th Floor
New York, New York 10048-1102

Charge Number: 160940732

EEOC Representative: Spencer H. Lewis, Jr.

Telephone Number: (212) 748-8500

TO THE PERSON AGGRIEVED: This is your NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge. Your charge was dismissed for the following reason:

No jurisdiction for the following reason, and therefore the Commission has no authority to investigate your charge further.

Other: No Employee-Employer Relationship.

The issuance of this NOTICE OF RIGHT TO SUE terminates the Commission's investigation of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in United States District Court. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN 90 DAYS FROM THE RECEIPT OF THIS NOTICE

OF RIGHT TO SUE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

On Behalf of the Commission

s/SHL

October 26, 1994	Spencer H. Lewis, Jr., Director
(Date)	(Typed Name and Title of EEOC Official)

cc: NYS POLICEMEN'S & FIREMEN'S RE